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In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 8

THE UNITED STATES OF AMERICA, APPELLANT

v.

LINE MATERIAL COMPANY ET AL.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN

SUPPLEMENTAL BRIEF FOR THE UNITED STATES ON REARGUMENT

INTRODUCTORY

This brief deals almost exclusively with the facts in the case, supplementing the Statement in the brief originally filed (hereinafter referred to as U. S. Br.), and showing in greater detail than seemed practicable there the particulars in which the findings below fall short of accurately reflecting the record.

We consider first the action of appellees General Electric and Matthews, both of whom the district court found to be "actively opposed" to price

control. We show that, in fact, General Electric, as representative of the major portion of the industry, took the initiative in devising a workable plan for price-fixing after agreeing with the other manufacturers that all would accept licenses containing price limitation provisions. And we show that Matthews, far from registering opposition to price control, was actually an enthusiastic adherent to any price-fixing combination which effectively bound all its competitors.

We take up next the case of Kearney, which alone of all the manufacturers had taken a license from Southern in 1938. We show that it did so only because of the representation made to it that the remainder of the industry would shortly afterwards be signed to similar licenses, that Kearney repudiated all obligations under the license when this inducement failed to materialize, and that Southern acquiesced in Kearney's repudiation.

Next, we state the circumstances under which the last four appellees adhered to the combination, viz., that they did so with full knowledge that all other manufacturers had already taken similar licenses with price-fixing provisions, and under conditions which underscore the basic price-fixing purpose of the agreements.

We then show that the meetings between the patentees and the licensees subsequent to the execution of the agreements were intended to and did in fact fix prices. We show that, after the price schedules went into effect, appellee Line policed

price violations on behalf of all the licensees, pursuant to agreement; that it attempted to fix resale prices; and that it undertook to support prices by inducing one licensee to proceed against another licensee for infringement of a patent not covered by the license agreement.

Next, we discuss the Kyle wet process porcelain patent, and show that this was introduced into the dropout hinge fuse patent situation in order to make price fixing effective in the dropout fuse industry. Our discussion of this point includes a reply to the arguments on the Kyle patent heretofore advanced in the appellees' brief (hereinafter cited as Line Br.).

After covering the foregoing, we proceed to show that the license agreements and transactions here in question were primarily and dominantly motivated by a desire to effect price control in the dropout fuse industry, and, by way of summary from the facts and evidence discussed in the foregoing sections, to emphasize that the several license agreements were a product of joint, reciprocal, and concerted action among the prospective licensees, prompted and participated in by the patentees.

Finally, also by way of summary, we explain why, in our view, the findings of the district court are "clearly erroneous" and are not, in any event, entitled to particular weight; and we conclude with a brief discussion of the law, dealing particularly with the effect of the restrictions on the

patentee which are included in the present license agreements, which, in our view, are not a mode of maintaining the integrity of a patent, but only means normally and reasonably adapted to secure the effective operation of a price-fixing combination.

In an Appendix, for the convenience of the Court, we have listed the names of the principal witnesses and letter-writers referred to in the text and throughout the exhibits, showing the connection of each with the several appellees. These names are listed alphabetically as well as in groupings under the companies concerned.

ARGUMENT

I. APPELLEE GENERAL ELECTRIC, WHICH THE DISTRICT COURT FOUND TO BE "ACTIVELY OPPOSED" TO PRICE CONTROL, ACTUALLY TOOK THE INITIATIVE AND REPRESENTED THE INDUSTRY IN MAKING PRICE CONTROL EFFECTIVE

The district court found (Fdg. 21, R. 509) that "General Electric actively opposed and sought to eliminate all price limitation." Actually, however, the uncontradicted documentary evidence in the record shows that General Electric first suggested concerted action vis-à-vis Line and Southern to the industry; that General Electric, after consulting with the other prospective licensees, took the initiative in presenting and perfecting the plan which made price control feasible and effective; that, after the others had informally agreed to go along on the proposed basis, General Electric acted as the industry rep-

resentative in negotiating with the patentees that General Electric contemplated an industry-wide combination; and that General Electric, which early announced its willingness to take a license, knew all along that its example would—as in fact it did—induce the other manufacturers to join the combination formally.

1. We do not dispute that General Electric did not initially desire price control on dropout fuses if this could be avoided, nor that General Electric sought in certain particulars to limit the scope of such control in the license agreements which it eventually signed (E. g., R. 309, 311, 236; Ex. GE-44, R. 1980). Appellees for their part do not contend that General Electric was opposed to price control or price-fixing on principle; they could hardly attribute such a view to the company which was protagonist in the litigation that produced the Magna Carta of price-fixing by patentees. *United States* v. *General Electric Co.*, 272 U. S. 476. Rather, the objection was far narrower, being based on the circumstance that General Electric objected to having others fix General Electric's prices (R. 199). "We didn't want anyone setting our prices for us" (R. 337).

In any event, it is a fact, proved by contemporaneous documentary evidence, that General Electric took the lead in giving definitive form to the industry-wide price-fixing plan, and in assuring the progress of that plan toward consummation.

2. In May 1930, Wagner of General Electric

suggested to Bobst of the same company (Ex. 47, R. 699–700)—

> that as we didn't seem to be getting anywhere on this, it might be a good thing to get everybody together—that is, the patent and commercial representatives of Westinghouse, Matthews, Schweitzer & Conrad, ourselves, and Kearney, if they will state that they have not already signed an agreement—in order to discuss the subject thoroughly. This is the alternative to dealing with these companies separately, which has resulted in not much progress.

3. At the June 1, 1939, meeting of the prospective licensees which resulted from Wagner's suggestion (see Exs. 49–50, R. 703–706), agreement was reached on three points: first, that no further serious efforts would be made to invalidate the basic Lemmon and Schultz patents;[1] second, that a price-fixing agreement for the entire industry would be traded out with Line and Southern; and third, that General Electric would be the representative of the industry to bargain collectively with the patentees.

(1) Two contemporaneous documents reflect the agreement.

Railway's representative, summarizing the results of the June 1 meeting for the president of

[1] With this conclusion should be compared Lemmon's fear of patent litigation, even as late as 1943, when all but 0.7% by volume of the dropout fuses falling within those patents were under license. See Ex. 275, R. 1275, and pp. 71–75, *infra*.

his company, wrote on the next day (Ex. 49, R. 703):

> The decision was to go ahead and try to get a satisfactory agreement at a reasonable royalty and, possibly, get some price control into it.

Wagner of General Electric recorded the same conclusions in only slightly different language, also in a memorandum written the next day. He wrote (Ex. 50, R. 705–706):

> 2. It was the consensus that if a satisfactory agreement could be made with a considerably lower royalty than 5 percent, it would probably be best to take licenses. Lemmon has refused to grant any licenses without price control.
>
> * * * * *
>
> 5. The agreement itself was discussed from a legal and business standpoint, and a general agreement was reached as to the basis of a satisfactory agreement.

The same contemporaneous documents also reflect the joint determination to take no further steps against the patents, Carlisle noting (Ex. 49, R. 703) that

> This matter [of pursuing the possibility of Johnson's anticipation of the patents] was simply held in abeyance for the time being due to the final decision which was made.

This quotation immediately precedes the paragraph already set out at the top of this page.

(ii) It was also agreed that General Electric would deal with the patentees; the same two memoranda record the conclusions reached.

Railway's representative noted (Ex. 49, R. 703),

> The General Electric Company are going to meet with Line Material and Southern States on Tuesday, June 6th, and at that time they will put the following proposal up as one that would be acceptable to all of us.

"All of us" presumably included all the manufacturers present at the meeting, viz., General Electric, Westinghouse, Matthews, Schweitzer & Conrad, and Railway (R. 703, 705).

General Electric's sales representative, Wagner, recorded the same understanding (Ex. 50, R. 706):

> At the conclusion of the meeting, Mr. Bobst and I visited Mr. Lemmon's attorney and acquainted him with the fact that this meeting had been held, and told him in general what the other manufacturers considered desirable.

Later, on June 6, General Electric as the representative of all the industry had another meeting with Line and Southern, and duly reported to its principals the outcome of that second discussion (Ex. 51, R. 707).

It is clear from all of these letters and memoranda that the patentees, General Electric itself,

and the other prospective licensees recognized that General Electric, as the largest manufacturer by volume of dropout fuses (R. 502), was representing the entire industry.

And General Electric pressed for action. In a letter sent to all the other companies which had participated in the June meeting, Wagner called another joint conference for August, saying (Ex. 52, R. 709), "We expect to have something concrete to suggest which will expedite discussion and, I hope, avoid the necessity of more meetings on this subject."

4. That "something concrete" turned out to be the change in the license agreement which ultimately made price fixing effective.

In 1938, as we pointed out in our original brief (U. S. Br. 10, 20-21), Southern was the licensor in the agreement which Line and Southern circulated to the trade, while in 1940, the positions of the parties were reversed and Line became the licensor.

Under the 1938 arrangement, Southern was authorized to grant sublicenses under various Line patents and applications, including the Schultz dropout fuse application, but not the Kyle porcelain box patent (par. 2 of Ex. 12, R. 623, 624). Line, when selling equipment covered by a Southern patent, was required to maintain Southern's prices (par. 18 of Ex. 12, R. 623, 633), and Southern and Southern's licensee's, when selling equipment covered only by

Line patents, were required to maintain Line's prices (par. 13 of Ex. 16, R. 643, 648; R. 115, 119; Ex. S–4, R. 1778, 1779).

Under the 1940 scheme, Line rather than Southern was authorized to license third persons under the patents designated in the agreement (par. 3 of Ex. 86, R. 786, 788).

The change in the positions of Line and Southern, whereby the owner of the subservient patent replaced the owner of the dominant patent as licensor, was made at the instance of General Electric. This is a vitally important fact which the findings do not reflect,[1] and concerning which appellees' brief is significantly silent (Line Br. 16–17, and *passim*).

General Electric's patent lawyer, Bobst, had immediately observed that, under the 1938 draft, Line was fixing prices under an agreement to which it was not a party (Ex. 21, R. 662). This he regarded as "not proper" (Ex. 48, R. 701). At the conferences with the prospective licensees in the fall of 1938 and on June 1, 1939, General Electric's objections were communicated to the other manufacturers. Kearney's delegate noted in October 1938 that "The General Electric representative seemed to doubt the legality of Southern States Company entering into a contract to regulate prices on an article which they them-

[1] The district court refused to grant the Government's motion to amend Finding 15 to show this (R. 519–520).

selves do not manufacture" (Ex. 23, at R. 664). Similar doubts as to legality were expressed by Bobst the following June (R. 335).[4]

Nor were the difficulties of having Southern as licensor entirely legal ones. As Bobst testified concerning the meeting of prospective licensees on June 1, 1939 (R. 335):

> " * * * then the commercial people held a discussion as to the—well, as to whether price control could really be made effective in an industry of this kind.' There was discussion along that line.

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[3] Westinghouse had written Matthews at about the same time, "We fail to understand what right the Line Material Company would have to fix the prices, as proposed" (Ex. W-26, R. 2084). Kearney's lawyer had expressed a similar doubt (Ex. 22, at R. 661), though Kearney's vice-president felt that the matter was simply a question of a workable business understanding: "* * * we have correspondence with the Line Material Company which automatically becomes a part of the contract and which indicates their good intention of cooperating with the Southern States Company relative to price regulation on equipment manufactured by Line Material Company but not by Southern States" (*ibid.*). See also Matthews' letter in April 1939 (Ex. 42, R. 684, par. 3), "Unless said grant is of the type specified in our June 17, 1938, draft, we believe it is an inadequate foundation for your price-fixing program." And see generally Ex. S & C-5, R. 2030, expressing doubts as to the legality and effectiveness of Southern's 1938 license proposals.

[4] See also the testimony of Wilson, Schweitzer & Conrad's vice-president, regarding the same meeting (R. 431): "I had a good deal of feeling that the administration of price control in this type of apparatus would be quite difficult because of the variations in specifications and the variations in type of market through which these things had to be sold."

Then there was discussion as to the Southern States setting prices, and it seemed to be—everyone seemed to feel if we had to take an agreement with price control that the person setting the prices should be a manufacturer who had a full line of apparatus, and not a manufacturer who was only in a small part of the field. Then, from our standpoint, I brought up the proposition that we were interested in settling this whole situation at once, and that Southern States was not in the position to do that. In other words, it was a bit difficult to deal with Southern States because they had no authority to deal for the Line Company, and every time you brought up anything that was outside of the small scope that Lemmon could deal with, why, he couldn't say anything on it, except he would have to see Mr. Kyle, and you just didn't seem to get any place on those things.

Others present agreed that Line as licensor "made a complete line of cutouts and covered the field much more completely and would be able to keep a much better control over the general price situation than Southern States" (Ex. 49, R. 703).[4]

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[4] This thought appears with striking unanimity; see R. 128 (Lemmon); R. 313 (Kyle); R. 392–400 (Cooley). Carlisle of Railway testified (R. 480):

"Well, the one particular thing was that everyone felt that Southern shouldn't be permitted to fix prices on equipment which they didn't manufacture, and it was felt that anyone

Accordingly, to effectuate the understanding reached at the meeting and which was immediately acceded to by the patentees (Ex. 51, R. 707), a new form of license agreement was drawn up, naming Line as licensor. This agreement, whose paragraph 10 provided for price control, was drafted by Bobst, General Electric's patent counsel (Ex. 57, R. 715-720), the same who according to the later oral testimony was "quite provoked" that Line "kept insisting on price control" (R. 199). Bobst submitted the new draft to the August 10, 1939, meeting of the prospective licensees (R. 200-201, 342-343; see R. 720).

Thereafter, while the terms of the license were rewritten as the agreement was traded out, the substance of the price control clause drafted by General Electric remained in the license that was eventually executed.*

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who did set prices should be someone who manufactured a complete line and knew cost as well as general design and classification."

See also Wagner's memorandum to Bobst (Ex. 50 at R. 705-706):

"4. It was decided that it would be better to modify the proposed agreement so that Line Material would be the price fixing agency. The reason for this is that Southern States does not manufacture enclosed cutouts, which comprise by far the bulk of the material that would be sold under this agreement, and those present objected to having a company with no direct interest in the business establish the prices."

* Compare par. 10 of Ex. 57, R. 717-718, with para. 9 and 10 of Ex. 94, R. 822-823. For the intervening negotiations, see U. S. Br. 17-20, and references cited.

Once General Electric's patent lawyer had shown the way, the remainder of the negotiations concerned matters of detail; and a statement by Line's president that "we are interested at this time in the setting and control of prices relating to such types of fuses as we now make, and would be interested in the same way providing at a later date we added on additional fuse lines coming under our patents" (Ex. GE-45, R. 1981) was hailed by a member of General Electric's organization as "a foundation for a proper price control clause in the proposed agreement although we do not feel that he has expressed it in terms that will be sufficiently lasting" (Ex. 61, R. 727).

5. General Electric continued to take the lead in representing the industry and in enlarging the price-fixing group by the inclusion of other manufacturers. It invited Kearney, which had not been present in June, to attend the August meeting, saying (Ex. 53, R. 711),

> I am aware that you have signed the agreement with Mr. Lemmon, but since then the Kyle wet process porcelain patent has been introduced into the situation, which considerably broadens the effect on the industry, and in which naturally you will be much interested.

It was at the August meeting, as noted above, that the Bobst draft was presented, and Kearney's lawyer, who reported to his client the views

of the several manufacturers there represented, at once recognized General Electric's predominant position. He said (Ex. 56 at R. 723):

> * * * The Lemmon-Kyle group and the General Electric representatives were to stay over in New York to work out the details of such an agreement.

Wagner of General Electric, after the meeting, took the initiative towards a further enlargement of the group, urging that the patentees and the licensees approach the appellee Porcelain (Ex. 59, R. 724, 725; but cf. R. 290). And, in a report to all of the other manufacturers who had been represented at the August conference, five in number, Wagner indicated that General Electric would probably sign with the patentees (*ibid.*). Further meetings took place, notably in October 1939 (Ex. 71, R. 744), and, while General Electric eventually signed unconditionally, it protected itself fully against later changes by introducing a most favored nation clause into the agreement (as to which see pp. 18, 144-145, below). Thus it clearly contemplated an industry-wide combination, and this with full knowledge that, as an inescapable consequence of being the largest manufacturer of dropout fuses, its example would be followed by others, and would be held out to them as an inducement.

6. For it was evident, from the very beginning, that recognition of General Electric's dominant position would be a substantial factor in bringing

the dropout fuse industry into a formal industry-wide price-fixing combination.

As early as October 1938, "Mr. Cooley [of Matthews] stated they would not sign until the General Electric Company signed and were lead to believe that the other companies would take the same stand" (Ex. 22 at R. 664). Cooley said this view rested on his feeling that, if General Electric with all its patent experts could not invalidate the Line-Southern patents, Matthews which was much smaller could not hope to do so either (R. 389-390). Line and Southern were aware, not only of Matthews' attitude, but also of its motivation; Southern wrote Line in May 1939 (Ex. S-14, R. 1793, 1794), "We anticipate objection from [Matthews] due to the Johnson drawing;[1] and for this reason we prefer to get G. E. and Westinghouse signed up first if this can be done." And Matthews' reluctance to move first continued. Cooley said, concerning the situation in June 1939 (R. 399), "so far as I was concerned, I was going to wait until General Electric had completed [their negotiations] before I took any action on behalf of my company."

Nor was General Electric in any doubt as to the effect which its own signing of a license agreement would have. When the General Electric draft

[1] Ex. 35, R. 686, inclosed in Ex. 34, R. 684. It was at first hoped that this drawing would be a representation of prior art sufficient to invalidate the Lemmon-Schultz patent application; later it was said that the drawing was too indistinct (R. 382, 384).

which made Line the licensor (supra, pp. 10–12) was forwarded to Line, General Electric had written (Ex. 38–41, R. 1976),

> I think the terms set forth in this draft would be satisfactory to others interested in having a license under these patents for drop-out fuse cutouts.

Bobst, the writer of that letter (R. 344), admitted on the stand that (R. 346)

> that paragraph was in the nature of a sales argument to the Line Material Company to possibly encourage them to accept the terms if they felt that others would probably take the same terms.

A few months later, Wagner wrote Bobst (Ex. 71, R. 744, 745) that "Mr. Brown and Mr. Kyle are very anxious to get our signatures as an inducement to get others to sign, and so that the agreements can be put into effect as shortly as possible after November 10." This was after Wagner had advised representatives of Westinghouse, Railway, Matthews, Kearney and Schweitzer & Conrad of his belief that General Electric would take a license under the two dropout patents (Ex. 59, at R. 725).

Consequently, Bobst's subsequent oral testimony (R. 352–353), that he did not know, when he recommended execution of the license agreement by General Electric's officers, what the others were going to do, and that he had no understanding with Line that the same agreement would

be offered the others, must be read in the light of the foregoing facts, and also in the light of Bobst's frank admission in this connection of the presence of the most-favored-nation clause in the agreement (R. 353), a clause which first appeared in the draft which Bobst presented to the August 1939 meeting (compare par. 15 of Ex. 57, R. 715, 719, with Exs. 16 and 18, R. 643 and R. 650). Clearly, therefore, the largest manufacturer of all envisaged a combination which would eventually embrace the entire industry. With such a provision in the agreement, General Electric was protected against subsequent changes, and in the end availed itself of the benefits of the clause (R. 168, 356; see Exs. 266–268, R. 1240–1263; see Ex. 254, R. 1228).*

Later, in January 1940, after the General Electric licenses had been substantially agreed upon, Line sent copies to Southern's lawyer (Ex. 85, R. 785), advising that

> We are now proceeding to revise all other agreements in the light of the General Electric agreements and will submit copies

* Further indication of General Electric's reliance on the basic understanding that industry-wide action would be taken is found in its action subsequent to execution of its licenses in 1940. Although the "B" licenses (Ex. 94, R. 819, 822) specifically required General Electric to maintain Line's prices, General Electric did not change its own prices until February 3, 1941, i. e., after all major competitors had signed licenses, and after all these had conformed their classifications to Line's. See the references at U. S. Br. 28, note 28.

[illegible] you and Mr. Lamson for approval before sending them to prospective licensees. It is proposed not to send these to other licensees until G. E. has signed.

When General Electric did finally approve, Line bombarded prospective licensees with the news. It wrote five letters enclosing drafts of agreements which General Electric had approved, urging the other manufacturers' "immediate consideration and execution" of a like license (Exs. 97–101, R. 854–863). It wrote more letters when General Electric's executed agreements were received a week later (Exs. 104–106, R. 866–867), and another series when the Line-General Electric litigation over the Kyle patent was finally dismissed (Exs. 109–114, R. 870–875; see Ex. GE-62, R. 2006). Some prospective licensees, accordingly, were thrice advised of General Electric's adherence to the plan. Meanwhile, in reply to an inquiry from General Electric as to what other manufacturers were bound (Ex. 107, R. 868), Line replied (Ex. 116, R. 880) that it was already "active with the other prospective licensees," adding, "Any help from your standpoint will be appreciated." General Electric continued to manifest interest in the negotiations with the later signatories. See Exs. 155–156, R. 1010–1011; Ex. 160, R. 1016; Ex. 246, R. 1220; see Ex. 273, R. 1272.

The impact of General Electric's leadership was unconsciously demonstrated in the summer of

1940 by Cooley of Matthews in a private circular which he sent his salesmen to explain their company's signature of the license agreement. He wrote in part (Ex. 170, R. 1068):

> * * * after considering all factors we believe it advisable to accept the license which is being offered to us and all other Cutout manufacturers, particularly in view of the fact that the General Electric Company saw fit to accept and sign a similar license agreement ahead of us.

Years earlier, when the basic Line patents were involved in an interference in the Patent Office, General Electric's patent department had prophesied (Ex. GE-2, R. 1914), "* * * whoever wins * * * will doubtless try to squeeze all others." By signing first, by permitting its action to be used as an inducement, and by furnishing the winners in the patent contest with a "paragraph * * * in the nature of a sales argument" (R. 346), General Electric was not only improving its own position but was substantially assisting Line and Southern "to squeeze all others."

7. General Electric did obtain from Line a license under the Kyle patent which contained no provision providing for price control as such, though that license did provide for inspection of the licensee's books (par. 5 of Ex. 95, R. 846-847) and for cancellation by the patentee on 90

days' notice (par. 15, R. 329-330).[9] Line was at pains to notify all other prospective licensees that the cancellation provision was the equivalent of price control (Ex. 73, R. 750, 751, 752; Ex. 76, R. 754, 757; Ex. 75, R. 756, 761; Ex. 77, R. 762, 763, 764; Ex. 78, R. 765, 766, 767; R. 158, 166); a circumstance which any astute businessman would of course perceive.[10] The district court's failure to advert to this circumstance, though requested to do so (R. 521, 522), makes its Finding 19 (R. 509) "clearly erroneous"; and appellees' repeated reference to General Electric's Kyle license as one without price control (Line Br. 46, 54), omitting Line's comments and the others' understanding of the effect of the cancellation clause, falls, we submit, something short of complete candor.

8. The impression of General Electric which the findings reflect is that of a reluctant adherent to a price-fixing agreement. But, once the documents in the record are examined—and no one disputes their authenticity, however much some of their authors endeavored to "explain" them

[9] Similar provisions were included in the 1941 revised license (Art. IV (c) of Ex. 267, R. 1956; Art. VIII (a), R. 1959).

[10] E. g., Cooley of Matthews (R. 408): "* * * They told me that they did have that right to cancel on 90 days' notice, and I think that I am intelligent enough to know that that meant for the protection of their business and that could mean anything, and I would have acted accordingly if I had been in Line Material's shoes." For Westinghouse's understanding of this provision, see Ex. 81-1, R. 2035-2037.

and the witnesses should cause the exhibits are considered, there appears a very different, and a very much more accurate, picture. The record shows with compelling and indeed devastating force that it was General Electric which suggested and later undertook concerted action on behalf of the major manufacturers in the industry, which gave effective force to the price-fixing plan and carried that plan into execution, and which was at all times fully aware of the powerful stimulus which its example would have on the conduct of others similarly situated.

It follows that neither the opinion (R. 496) nor Findings 15, 16, 19 and 21 (R. 506-507, 509-510) accurately set forth General Electric's actions in respect of price control or its position and influence in the negotiations, and that the district court should have granted the Government's motion to amend those findings (R. 518-520, 521, 522).

II. APPELLEE MATTHEWS, FOUND BY THE COURT BELOW TO BE ACTIVELY OPPOSED TO PRICE CONTROL, WAS ACTUALLY OPPOSED ONLY TO PRICE CONTROL WHICH BOUND IT AND NOT THE OTHERS. MATTHEWS ENTHUSIASTICALLY EMBRACED EFFECTIVE PRICE CONTROL AND, AFTER THE PRICE-FIXING LICENSES BECAME BINDING, WAS ACTIVE IN INITIATING ACTION TO STOP PRICE CUTTING BY COMPETITORS.

The district court found that "Matthews actively opposed" price control" (Fdg. 22, R. 510). It also found, in substance, that Matthews took

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* The word "oppose" in the finding is doubtless a misprint. See the text of the opinion, R. 497.

a license independently, in disregard of what other manufacturers might do (Ibid.). Neither part of the finding correctly reflects the record. The fact of the matter is that Matthews was opposed, not to price control as such, but only to price control which bound it without binding its competitors. It was enthusiastic over effective price control, and participated actively in the policing of the industry. Moreover, every step which it undertook in connection with the execution of the agreement was dictated by the expressed view that, to protect its own competitive position, it did not wish to be bound by price-fixing provisions until the entire industry, the patentees therein included, was likewise bound.

1. It is true that Matthews sought to limit the scope of the articles covered by the license agreements to those coming within the Line-Southern patents, though this may well have been dictated more by a desire to avoid payment of royalties than by any objection, theoretical or otherwise, to price-fixing. See Ex. M-2, R. 2029; Ex. M-6, R. 2040. It is also not disputed that Matthews, desiring to occupy the same position as General Electric, expressed a strong preference for a Kyle patent license on the same terms that General Electric had obtained (R. 221-222, 869-874; Ex. M-1 at R. 2036; Ex. 71, R. 744). Line, which had assured Matthews that the cancellation clause in General Electric's Kyle license had the same effect as a price-control provision (Ex. 77 at

R. 753, 762), had refused to include a similar provision in the Matthews license (R. 377). But the mass of letters and memoranda written by Matthews' representative, Cooley, are devoid of objection to price-fixing as such." Indeed, Cooley objected to General Electric's Kyle license provision as constituting "a lack of adequate price control" (Ex. 117, R. 378; R. 402-403), and, very early in the discussions, was prepared to say to Southern (Ex. 42, R. 691, par. 2) that "Unless said grant is of the type specified in our June 17, 1938 draft, we believe it is an inadequate foundation for your price fixing program."

2. Matthews in fact was enthusiastic over any price-fixing which was effective, viz., which bound everybody and left no one at a competitive disadvantage.

As early as November 1939,[14] Cooley, who single-handedly carried on the negotiations for Matthews, wrote to Line regarding the price-fixing provision which spoke of the "spirit and intent" of the proposed agreement (Ex. 80, at R. 773):

> • • • We most enthusiastically favor this provision and would like to see it

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[13] The recollection of Line's representatives on this point to the contrary (R. 221, 317) finds no support in any contemporaneous document.

[14] For an early letter reflecting Matthews' desire for a most favored nation clause, see Exhibit S-11, R. 1787.

rigidly enforced, but are curious to know how the licensor proposes to enforce it. For instance, how can either licensor or licensee control this situation on lump sum bids or orders taken by a jobber or wholesaler who has purchased such products and paid for them? As another instance, how can this be controlled where the cutouts may be quoted by either licensor or licensee at regular schedule A prices but other items in the bid have no legally established prices and the low bidder on the entire bid would then secure the order? As a third instance, the Line Material Company (or any licensee, their jobbers or other selling agencies) may bid on a list of materials with cutouts being quoted at schedule A prices but with reductions being quoted on other items such as wire, poles, hardware, etc., or a lump sum reduction being granted for the entire list of materials. Naturally, reductions on other items will influence the order for cutouts. How does the licensor propose to deal with this situation, which has been a source of much annoyance to the industry in the past?

Asked to explain this on the stand, Cooley presented the problem facing Matthews when facing a larger competitor, and said (R. 376),

> * * * On some occasions where we were in a position to offer a concession of price against that kind of competition we could maintain our share of the business,

but when it was built up so that we had to [illegible] the other large organization [illegible] On the record both prices were at all times [illegible] were in accordance with the provisions of a license, but on the record something was done by the larger organization that definitely was a competitive disadvantage to us and that was one of the very principal reasons why I objected to price control, but if we had to have price control and it was a foregone conclusion that we did if we wanted the claims of these patents, then I enthusiastically supported the idea that if something could be done under a spirit and intent clause, I wanted it, but I questioned very seriously whether anything could be done.

And on cross-examination (R. 405)—

Q. * * * And I understand that your explanation for your enthusiastic favor is that if everybody in the industry is under price control, then price control should be rigidly enforced; am I right?

A. Yes, if they are under price control.

Holding these views, Cooley set out to obtain an arrangement which would not control Matthews' prices until the prices of the major portion of the dropout fuse industry were likewise controlled. Thus, in his November 1939 letter to Lane, he suggested that price control and royalty payments should not commence until at least eight cutout

manufacturers and other licensees [illegible] (Ex. 59 at R. 770)

"1. Are we to be expected to pay royalties and submit to price control on [illegible] [illegible] [illegible]

[redacted]

11. Price Control, Section 9 of both Agreements. We have noted [redacted] attaching to both agreements. There appear to be several incorrect leanings which can be considered separately in a conference. In the meantime, this price control provision should not become effective except as outlined in paragraph numbered 4 of this letter.

Cooley sent copies of this letter to at least Railway (Ex. 128, R. 869) and Schweitzer & Conrad (Ex. 126, R. 868).[4]

At a conference with Line and Southern on May 31, 1940, Cooley's proposal was agreed to with the modification that only six manufacturers

[4] Cooley testified that he recalled other communications of the steps Matthews took in the negotiations (R. 870-880).

need sign to make price control effective. Railway and Schweitzer & Conrad were duly notified of this by Matthews on the following day (Ex. 130, R. 897; Ex. 131, R. 899), as follows:

> C: The effective date for price control will be as soon as six Cutout manufacturers are bound by agreements. Since Line Material, Southern States and G. E. are already bound by these agreements, this means that only three more licenses must be executed before the price control features become effective.
>
> * * * * *
>
> I: Schedule A for Price Control. This becomes effective as soon as six manufacturers are bound by these agreements. However, the licensors will check this schedule with all manufacturers for any possible errors or necessary adjustments.

A few days thereafter, Matthews signed with Line and Southern (Ex. 134, R. 902; Ex. 135, R. 926; Ex. 136, R. 942), and the agreements were, in accordance with the understanding reached, deposited in escrow (Ex. 133, R. 900).[18]

The purpose of the escrow was to enable Matthews to remain on a competitive basis; here is how Cooley explained the matter five years later on the witness stand (R. 379):

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[18] Schweitzer & Conrad, Railway, and Pacific were notified of the signing on the day the agreements were executed (Exs. 137, 138, R. 944; see Ex. 178, R. 1049).

> The idea behind the escrow arrangement was to avoid the necessity of our paying a royalty which cut into our profits and also to avoid being bound by prices set for us while a large part, the major part, of our competition was able to go out and undersell us. We wanted to be on a competitive basis. The principal reason why we objected to the price control feature entered into this deal too, that if we signed without a majority of the industry being signed to similar licenses, we were then at a competitive price disadvantage and in a small company like ours that can be very disastrous.

But, regardless of this testimony in 1945 that he opposed price control, Cooley in 1940 advised the Matthews sales force that price maintenance was the principal condition of the license agreement. Here are representative excerpts from the Matthews circular dated July 12, 1940 (Ex. 170, R. 1033, 1034, 1035–1036):

> Effective today, we have executed a patent license agreement as licensee, with the Line Material Company of Milwaukee as licensor. This agreement grants us a license to make and sell Open Type Dropout Cutouts and Reclosing Fuswitches and all Porcelain Housed Cutouts under basic patents owned or controlled by the Line Material Company, provided we follow all of the terms and conditions of the license

agreement, principal of which is the price maintenance clause.

* * * * *

That means that, effective the date of this notice, it will be impossible for us to sell any of the licensed devices at any concession from our published price sheet. You will, therefore, please observe to the letter our printed price sheets on Open Type Dropout Cutouts, Reclosing Fuswitches, and all Porcelain Housed Cutouts.

* * * * *

* * * Remember, that five other manufacturers are already bound by the same provisions in their license agreements, so they cannot offer any concessions either. Furthermore, we believe it is only a question of a short time until the other four manufacturers will be bound by similar license agreements, so that no concessions of any nature will then be available on licensed devices, as each manufacturer will then be legally required to observe the price control provisions in his license agreement.

This will have the effect of eliminating price competition on licensed devices, and you can then confine your sales activities on Open Type Dropouts, Reclosers and all Porcelain Housed Cutouts to the superior quality, performance, design and operating features of these Matthews Products, knowing that all prices will be equal if all manufacturers live up to their agreements

with the licensees—and legally they are supposed to do so.

Cooley continued to press his all-or-none idea during the interim between the effective date of the licenses and the beginning of price control thereunder. In October 1940 he impatiently inquired of Line (Ex. 314, R. 1341) "when we may expect the receipt of new schedules giving complete price control data on the above licensees." In November he again wrote Line (Ex. 319, R. 1346):

> I. Is it your intention to execute licenses with all members of the NEMA Distribution Cutout Group before making this proposed Schedule A effective on the present licensees? According to our latest information, licenses have not yet been executed by S&C, Westinghouse, Porcelain Products and Pacific. Also, is it your intention to offer licenses to Johnson Manufacturing Company and Joslyn Manufacturing and Supply Company? For our part we would like to see all manufacturers operating under licenses, otherwise we are likely to be at a disadvantage through unlicensed competition.

Line replied in reassuring vein (Ex. 326, R. 1380),

> * * * that it was our original intention to execute licenses with all members of the distribution cutout group before making full schedule effective, and we took

> this view because it was our expectation that such action could be obtained without any great delay. Unfortunately, in one or two cases, there has been some delay, although we are expectant that such matters will be settled very shortly. Consideration is being given to the thought that licenses should be offered to Johnson Manufacturing Company and Joslyn Manufacturing & Supply Company.

Cooley continued to manifest concern about the non-signing manufacturers after the price schedule had been agreed upon, and inquired of Line in January 1941 whether Porcelain, Westinghouse, and Schweitzer & Conrad had signed so that they would also be bound by the price schedule (Ex. 340, R. 1379).[20] At the time time, Cooley assured his salesmen that, along with the new prices which Matthews was adopting to conform to the price-fixing arrangement under the licenses, the other manufacturers were also publishing new price lists (Ex. 342, R. 1382–1383; Ex. 345, R. 1387, 1388). In the circular last cited, Cooley said (R. 1388),

> Since our policy is going to be one of strict maintenance of our own published

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[20] Cooley said of Ex. 340 on the stand (R. 407), "Well, there again my principal interest being in sales I wanted to know whether my competitors are going to be hobbled by the same things that hobble me so that in going out and instructing my salesmen on their sales activities I want to know what my competitors are doing."

> price schedules, we will appreciate your thorough cooperation.

Again, in March 1941, in connection with the announcement of a price increase, Matthews' salesmen were told that (Ex. 360, R. 1437, 1438):

> All other Cutout manufacturers have similar licenses from the licensor and have been given this same notice, so we are on identically the same competitive price basis as the other Cutout manufacturers.

In view of the foregoing detailed recital, an account which is based almost exclusively on contemporaneous documents, Cooley's later testimony, that there was no agreement that others would also take a license if Matthews did (R. 379) and that Matthews never gave anyone else any assurance that it would sign (R. 391), can hardly be regarded as either weighty or significant. Nor can Cooley's statement (R. 380, 405) that the escrow idea originated with Line be seriously considered in the face of his own letter (Ex. 122, R. 885, par. 4, quoted *supra*, pp. 28-29) which plainly shows that this had been Matthews' idea all along (cf. R. 406).

3. Matthews' insistence that it should not be bound before the major portion of the industry was bound found striking expression in its demand that the patentees themselves should undertake not to cut prices, and should permit their books to be inspected by the licensees, as well as vice-versa.

This was a point that Matthews had raised at the very outset, when licenses were still being sought by Southern. Cooley had then objected (Ex. 12, at R. 690),

> 22. Your Section 11, fourth paragraph, imposes upon us an obligation to follow Line Material's prices, but no obligation on you to follow such prices, and no provision for Line Material to follow its own prices, nor to notify us as to what its prices are, nor to give us proper notice of proposed changes therein. This paragraph obviously needs revision. We have not seen your agreement with Line Material, so we are not at the moment in a position to suggest what the specific new wording should be for this fourth paragraph.

When Line took over the negotiations, Matthews continued to press its point. In the November 1939 letter, heretofore quoted from, Cooley also had written (Ex. 80 at R. 772–773),

> 8. Section 6 of both agreements "Inspection of records." This section of both agreements makes it possible for the licensor—a competitor of ours—to obtain names of our customers through their appointed auditors in checking royalty reports. Obviously that is unfair. We suggest another sentence be added to this section, as follows: "such auditor or accountant shall not be permitted to divulge to licensor the names of licensee's customers or other private or confidential information

obtained during examination of the licensee's records for purposes of verifying licensee's reports". We also believe that an additional provision should be included in this section to grant licensees the right to verify "price control" observance by Line Material and Southern States on the same basis as the licensor's right of verification."

Matthews won its point in the last conference that preceded the signing (Ex. 130, R. 907, par. G), and the agreements as executed contained provisions for maintenance of published prices by the licensors (Ex. 134 at R. 906, par. 9; Ex. 135 at R. 929-930, par. 9) and for inspection by the licensee of the licensors' books (Ex. 134 at R. 904, par. 5; Ex. 135 at R. 928, par. 5).

4. The exhibits show that, during the entire course of the negotiations, Matthews never played a lone hand; on the contrary, consistently with its policy of wanting the entire industry bound in order to protect its own competitive position, it kept in extremely close touch with all its competitors, and in at least one instance it was instrumental in inducing a company, hitherto unrepresented in the negotiations and not committed to any of the understandings reached, to become a party to the price-fixing combination.

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[17] Matthews' proposal that the licensee have the right to inspect the patentee' books is also reflected in a letter from Kearney's lawyer, who sought the same right for his client (Ex. 82, R. 777, 779).

From the very outset, as we have already pointed out (*supra*, p. 36), Matthews set its course by what General Electric might do, and agreed to let General Electric act as its representative in the license negotiations (Exs. 51–52, R. 707–710).[29] Thereafter, it kept in close touch with the other prospective licensees.[30] In November 1939, Matthews' comments on the Line draft, already quoted (Ex. 80, R. 770; *supra*, pp. 24–25, 27), were circulated to six other manufacturers (Ex. 81, R. 776). Thereafter, when Matthews was notified by Line that General Electric had signed licenses (Ex. 101, R. 862; Ex. 106, R. 867) and Cooley had personally verified the fact of execution (see Ex. 124, R. 891, par. 2; Ex. 130, R. 897, par. A), it still hesitated, because of, among other things, "a lack of adequate price control in the General Electric agreement" (Ex. 117, R. 878). But even then Matthews sought refuge in joint action, and suggested "a conference with all parties present for a mutual discussion of all questionable points" (*ibid.*). These views were communicated to Railway, Kearney (*ibid.*), and Schweitzer & Conrad (Ex. 116, R. 877), in com-

[29] While, as we point out above at p. 16, this early reliance on General Electric may have rested on that company's superior patent knowledge, the later negotiations were of course predicated on the assumption that no further serious efforts to attack the Line-Southern patents would be made.

[30] Matthews had been in favor of cooperative action even when Southern as licensor was still trying to get Kearney interested (Ex. 18, R. 636, 637).

communications by telephone and mail which sought to ascertain what these manufacturers were planning to do. Railway welcomed the proposal, saying (Ex. 119, R. 881):

> We believe your suggestion of all getting together after we have had time to consider this is a very good and to us most satisfactory one. The only thing is we would like to get this thing settled up and know just where we stand on it.

After further study of the Line proposals, Matthews' comments, already referred to (Ex. 122, R. 885, supra, pp. 28-29), were sent to Lane under cover of a letter which said (Ex. 121, R. 883):

> We believe that individual conferences will not accomplish much, whereas a joint conference between yourselves and Southern States as proposed licensors and all of the proposed licensees will result in the settlement of all differences.

Copies of both Matthews letters were sent to Railway (Ex. 123, R. 890) and to Schweitzer & Conrad (Ex. 126, R. 895). Railway on its part assured Matthews in reply that (Ex. 129, R. 896) "If we make any move whatever you may be sure that we will keep you posted as to just what we do." And Matthews did likewise, notifying Railway, Schweitzer & Conrad and Pacific of its own signing of the license agreements (Exs. 137, 138, R. 944; see Ex. 178, R. 1049).

Cooley did not hesitate to advise his own sales force of the reliance which he placed on the adherence of the other manufacturers to the price-fixing combination made by the licensees. In language already quoted (Ex. 170, R. 1033, *supra*, pp. 20, 31-33), he frankly told the Matthews salesmen that General Electric had signed first, that five other manufacturers were already bound, and that the other four would, in "only a question of a short time" (R. 1035), be similarly bound. Six months later, Cooley still inquired of Line as to the status of three supposed holdouts, Porcelain, Westinghouse, and Schweitzer & Conrad (Ex. 340, R. 1379, *supra*, p. 34). Porcelain had in fact already signed (Ex. 209, R. 1120), and in his next salesmen's circular Cooley explained why he thought the other two would soon be parties to the license arrangement (Ex. 345, R. 1387, 1388).

Meanwhile Matthews had been instrumental in obtaining Pacific's adherence to the combination. That company, belatedly acknowledging Matthews' notification of signature, had written (Ex. 178, R. 1049),

> We have not heard from the principals of this license agreement and I'd appreciate if you would advise us if all the interested parties have signed up with them. If they have, it seems to me that if we want to get in on this agreement I had better write them for a copy of the license agreement and sign it up.

Matthews replied, listing the signatories and non-signatories, suggesting that Pacific communicate with Line, at the same time telling Pacific that a copy of the Matthews letter was being sent Line "as we feel certain that Line Material has no thought of attempting to exclude your company from the advantages of similar agreements" (Ex. 179, R. 1050). Line renewed its approach to Pacific two days later (Ex. 180, R. 1051), and, after some negotiating over details,* Pacific became a party to the license combination in December 1940 (Exs. 212, 213, R. 1122; see Ex. 216, R. 1124). Pacific knew before execution that its license was identical with those of the other manufacturers (Ex. 214, R. 1123; Ex. 215, R. 1123).

5. Even before the price schedule which embodied the joint ideas of the licensees became effective on January 18, 1941 (Exs. 354–356, R. 1403–1428), Matthews was active in complaining to Line concerning other manufacturers' lower prices. In July and August 1940, it sought permission to meet Kearney's price competition on a particular item (Ex. 169, R. 1032; Ex. 172, R. 1038; Ex. 402, R. 1567; Ex. 405, R. 1569; see also Ex. 401, R. 1566, and Ex. 403, R. 1567). After January 1941, it transmitted numerous complaints to the licensor (Ex. 427, R. 1600; Ex. 431, R. 1604; Ex. 435, R. 1609; Ex. 441, R. 1615; Ex.

* Ex. 201, R. 1111; Ex. 204, R. 1114; Ex. 211, R. 1121.

442, R. 1616; Ex. 454, R. 1609; Ex. 440, R. 1577; Ex. 413, R. 1590; Ex. 423, R. 1592).[2] On occasion Matthews was advised by Line that necessary corrective action had been taken (Ex. 427, R. 1611; see Ex. 436, R. 1610); in other instances, Line took the position that there had been no violation (Ex. 433, R. 1606; Ex. 411, R. 1573). For its part, Matthews advised the licensor that any complaints of its own violations were unfounded (Ex. 431, R. 1604, replying to Exs. 428–429, R. 1601–1602, which in turn were based on Ex. 432, R. 1605).

6. Matthews was necessarily aware that, once the entire industry was licensed, price increases would inevitably result. Some manufacturers had expressed, even in the negotiating stage, a hope that higher prices would be fixed; Railway had written Matthews in April 1940 (Ex. 119, R. 881), "We would like to see a revision in a good many of the prices upward as we certainly feel that some of the equipment is priced too low."

The price schedule that went into effect in January 1941 did in fact contain increases, but at first the impact on Matthews' line of business was small (R. 391). But when, less than two months later, Line raised a $6.60 Light Duty Open Type Cutout to $8.36, Cooley observed to

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[2] We have cited these exhibits chronologically, rather than in relation to their position in the record. Ex. 431 (R. 1604) involves a complaint by Matthews of Line's violation of the price schedule.

Mr. Claude Matthews (Ex. 369, R. 1435), "Things are moving fast and furiously." They were apparently moving a bit too fast, because two days later Cooley instructed his sales force how they could accept orders at the old price before the increase went into effect (Ex. 369, R. 1437). In May, when rumors of another price rise seemed well founded, Cooley again showed each Matthews salesman how (Ex. 377, R. 1460) "you can assure your customers that they will have ample time to protect themselves against this price rise for their *reasonable* requirements of Cutouts." [Italics in original.]

In June 1941, Matthews suggested a downward price revision on one item covered by the license agreement (Ex. 466, R. 1645), because "we find it difficult to justify a $10.00 charge in one case and a $20.00 charge in another case, when the difference in cost to us is less than 50¢ and the difference in the device is so minor, that the customer cannot even see it." Line refused to lower the price (Exs. 467–468, R. 1646–1647).

7. Finally, it should in all fairness be noted that on one occasion Matthews did actively—and successfully—oppose price control under the license combination here in question.

One of Matthews' jobbers, Kops Electric, "bid our Cutouts exactly as we quoted them, except that they quoted the War Department a 1% cash discount for prompt payment" (Ex. 414, at R. 1584). Another jobber quoted a 2% cash dis-

count. Kline, Line's sales manager, telephoned Cooley and "instructed" him to see that the bids were withdrawn, as they did not conform to Line's license to Matthews. Cooley replied that "these two firms were acting as jobbers—not agents—for us, and that I did not think we could control their resale prices" (*ibid.*). Cooley then submitted the question to Matthews' attorney, saying (R. 1585),

> * * * My chief concern is to avoid the possibility of running afoul Anti-Trust Laws and the terms of our consent decree in attempting to force our selling price on a jobber or dealer, even though the Line Material Company controls our price under our license.

The lawyer of course agreed with Cooley, but when Kline was advised, "He was very mad about it, and stated that they would try to find some way to control jobbers' resales in the license agreement" (Ex. 415, at R. 1587).[*]

In other words, Matthews' outstanding success in avoiding price control occurred in connection with the licensor's attempt to control—resale prices!

8. It follows from what has already been said under this heading that neither the district court's opinion (R. 497) nor its Finding 22 (R. 510)

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[*] Kline testified that Line's lawyer dissuaded him from persevering in similar attempts (R. 285). But the record shows that, about fourteen months later, Kline was once more attempting to control resale prices (*infra*, pp. 65–67).

fairly reflect Matthews' attitude or the nature and extent of its activities, and that the Government's motion for an Amended Finding 22 (R. 522–523), for an Additional Finding 11A (R. 530) as to policing of price violations,[25] and for so much of Additional Finding 6A as related to the escrow agreement (R. 528),[26] should have been granted.

III. APPELLEE KEARNEY WITHDREW ITS PATENT INTERFERENCES WITH SOUTHERN AND TOOK A LICENSE FROM SOUTHERN IN 1938 WHICH CONTAINED PRICE-CONTROL PROVISIONS, TAKING BOTH STEPS ON THE REPRESENTATION THAT ALL OTHER CUTOUT MANUFACTURERS WOULD SHORTLY BE BOUND BY SIMILAR LICENSES. WHEN THIS INDUCEMENT FAILED TO MATERIALIZE, KEARNEY REPUDIATED ITS OBLIGATIONS UNDER THE LICENSE, AND SOUTHERN ACQUIESCED IN THAT REPUDIATION. THE DISTRICT COURT'S FINDINGS FAIL TO REFLECT THIS COLLATERAL UNDERSTANDING WHOSE PROOF RESTS IN DOCUMENTS

The district court found (Fdg. 25, R. 511–512) that Kearney never registered opposition to price control, but went on to say that Kearney's signing of the Southern license was "largely due to its desire to obtain one which would permit it to remain in the cutout business, which was a substantial part of its line." The district court also found (Fdg. 32, R. 514) that there were no collateral agreements apart from the license agreements in evidence. Both findings disregard a mass of documents, written by and on behalf of

[25] For additional evidence supporting requested Additional Finding 11A, see *infra*, pp. 93–96.

[26] For evidence supporting the remainder of requested Additional Finding 6A, see *infra*, pp. 80–92.

Kearney, which show plainly and unequivocally that Kearney signed the 1938 agreement on the representation and with the understanding that industry-wide price-fixing would shortly be achieved; that when this "inducement", as Kearney's lawyer called it, failed to materialize, Kearney repudiated all of its obligations under the license; and that Southern acquiesced in the repudiation and thereafter undertook, along with Line, to make good the inducement by signing up the remainder of the industry.

1. The original Kearney-Southern negotiations began with a proposal by Southern in February 1937 (Ex. S-1, R. 1774) and ended with the execution of the license from Southern to Kearney on October 3, 1938 (Ex. 16, R. 643). Paragraph 10 of the license (R. 646) required Kearney to withdraw its patent interferences pending in the Patent Office and in the Court of Customs and Patent Appeals, a matter which had been discussed in the negotiations (R. 141, 412, 418). This step was taken to expedite the issuance of patents which would be used for price stabilization (Ex. 22, R. 663). Kearney's understandings of the inducements offered by Southern in those negotiations are reflected in a number of letters and memoranda.

Subsequent to the meeting of the cutout manufacturers held in October 1938, which took place after Kearney had signed but before any of the others had done so, Crump, who was Kearney's

vice-president and chief engineer (R. 410), reviewed the situation for Mr. Kearney, Sr. (Ex. 22, R. 663). Crump's memorandum reflects Kearney's growing concern when Southern's plan for industry-wide price-fixing failed of execution. He first listed three reasons why Kearney had signed the Southern license; the two here material are (R. 663):

> # 2. To allow the holders of the patents to stabilize or even increase resale * prices of equipment involved.
>
> # 3. To withdraw from the interference at this time in order not to delay issuing of the patents which will possibly be of primary importance in stabilizing prices.

But, Crump continued, the other manufacturers had indicated that they would make no move until the pending patents issued. Consequently, Kearney alone was bound to pay royalties. Moreover (R. 664)—

> We also find ourselves in the embarassing position of paying a royalty to Southern States, which we are advised is being split 50–50 with Line Material; and in consideration of that royalty we have received no stabilization of prices and have no immediate assurance that the Southern States Com-

* Testifying seven years later, Crump said that he meant "sale" and not "resale"; "that is ignorance on my part. I am an engineer, not a salesman" (R. 417). For this same witness's understanding of "stabilize," see R. 417, quoted below, pp. 127–128.

> pany are in a position to carry out their part of the agreement relative to price control.

Crump was not particularly concerned at the legal doubts expressed by General Electric and by Harrington, Kearney's lawyer, since (R. 664)

> * * * we have correspondence with the Line Material Company which automatically becomes a part of the contract and which indicates their good intention of cooperating with the Southern States Company relative to price regulation on equipment manufactured by Line Material Company but not by Southern States.

By way of reassuring news, Crump noted that he "had a talk with Mr. Lemmon privately, and he seemed to be willing to make any changes in our existing contract which would facilitate closing an agreement with the other companies" (R. 665). Lemmon for Southern also indicated that no one else would be dealt with more favorably than Kearney, but if concessions were necessary, then Kearney's license would be adjusted accordingly. Crump suggested that the royalties should not become effective until the patents issued, "in view of the stand that the other companies have taken"; or, alternatively, that Kearney give immediate notice of cancellation, "and then enter into a new agreement together with the other members of companies manufacturing like equipment at the time the patent issues" (R. 665).

Three days later, Kearney's lawyer, Harrington, wrote Southern a strong letter (Ex. 25, R. 670). He noted first that the attitude of the other manufacturers caused Kearney to doubt "the propriety of entering into the contract." He continued (R. 670-671):

> It was well understood by all persons directly concerned with the signing of the contract that the Kearney Corporation was persuaded to enter into the contract solely by your assurance that the other companies selling drop-out fuses would be immediately signed to like contracts and that you would immediately establish a price schedule which would be adhered to by yourselves and all of your licensees. We find now, however, that no headway whatever has been made toward the signing of contracts with these other companies and consequently that nothing has been done in connection with the establishment of a price schedule. As a matter of fact representatives of these other companies have stated that their companies will under no considerations enter into any agreements which provide for payment of royalties prior to the issuance of the patents on the drop-out fuse inventions which were involved in Interference No. 68,181; 68,183; and 68,918.
>
> The Kearney Corporation therefore finds itself in the position of being the only company in the group of companies selling drop-out fuses which is required to pay royalties on its product, and this require-

> ment stands in spite of the fact that there has been no establishment of a price schedule in connection with these fuses. This situation has very greatly disturbed the officials of James R. Kearney Corporation and I have been instructed to write to you suggesting that the contract be changed to take care of the situation that has arisen.

Three changes were suggested: first, that no royalties should be payable either until the other manufacturers paid them, or else until the pending Southern and Line patents issued; second, a modification of the royalty on dropout fuses above 15 KV; third, a clause requiring Southern to sue infringers, and a "most favored nation" clause. Harrington concluded (R. 671):

> These suggestions are made because the main considerations which prompted the Kearney Corporation to enter into the contract have failed to materialize, and while the Kearney Corporation has the right under the contract to terminate the contract on sixty days notice it prefers not to take that step until an effort has been made to straighten the matter out. However the officials of the Kearney Corporation are determined that the contract shall be canceled unless it is amended in accordance with the above suggestions, and have decided to pay no royalties under the contract until the matter has been adjusted to the entire satisfaction of the Kearney Corporation.

Southern acquiesced (Ex. S-8, R. 1784), saying that it did not expect Kearney to be at any disadvantage because of the license, and—

> We would not expect the Kearney Corporation to start paying royalties on unissued patents before other licensees do, nor at a higher rate; and we think that the Line Material Company will feel the same way.

Southern's Lemmon patent, No. 2,150,102, issued on March 7, 1939 (Ex. 2, R. 563). Southern immediately seized upon the alternative first suggestion offered by Harrington, and asked that royalties begin as of the date of issuance (Ex. 30, R. 678). This roused Harrington. After first securing approval of his proposed reply from Mr. Kearney Sr. (Ex. 37, R. 688; Ex. 39, R. 691), he replied to Southern (Ex. 38, R. 689) that while Kearney would establish a reserve fund for royalties, those royalties would not be paid to Southern "until the major companies which sell trip-out or drop-out switches of the type to which the license agreement relates are required to pay, and do in fact pay, like royalties on switches sold by them, and until a price schedule on switches coming under the agreement is established by you."

Harrington continued, in terms that left no possible doubt as to why Kearney signed the 1938 license (R. 689–690):

> You are quite familiar with the various reasons that prompted the Kearney Corporation to enter into the license agreement with you, and until the assurances made by you as to price control after issuance of your patent and signing of similar agreements with other companies in the industry are carried out, the Kearney Corporation feels that it is acting within its rights in withholding payment of royalties under the agreement.
>
> It is not the wish of the Kearney Corporation to act in an arbitrary manner in this matter but the officials of that organization cannot understand why it, of all the companies in the industry selling switches of the type to which the license agreement relates, should alone pay royalties on its products. As stated above the Kearney Corporation was induced to enter into the license agreement with you by assurances that most of the major companies of the industry would sign similar agreements and that a price regulation would be established by the patent owners. When this situation is brought about the Kearney Corporation shall be very glad to comply with all of the requirements of the license agreement with you.

Southern did not, so far as the record discloses, either reply to this letter, nor deny its statements relative to the representations and inducements made to Kearney. On the contrary, Southern's

president admitted their truth on the stand (R. 140–141):

> Q. Now, in that conference preceding the execution of this contract, what statements were made by you to representatives of Kearney with reference to their competitors signing a similar agreement?
>
> A. That we intended and expected to get similar agreements signed by all the leading competitors in the field, Line Material being already bound by an agreement that would bring them under the same category as Kearney.
>
> * * * * *
>
> Q. And you knew as a businessman that they were interested in what their competitors were going to do in the event that their prices were controlled, in the event that Kearney's prices were controlled?
>
> A. Yes, and we expected and intended to get all manufacturers of similar equipment bound by similar agreements.[28]

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[28] The testimony of Brown of Line confirms that of Lemmon, Southern's president (R. 135–136):

"Q. What did you do immediately after the—what steps had you taken immediately after the signing of the Kearney contract towards attempting to get other persons to take licenses?

"A. We immediately—that is, within a week—attempted to—wrote letters and attempted to carry out the provisions of getting other producers—other manufacturers and infringers licensed under the same contract that Kearney—under a similar contract to the one that Kearney had signed.

"Q. And did you make attempts immediately following that?

"A. We did."

Moreover—and this is vitally significant—Southern made no efforts to collect any royalties from Kearney under the 1938 license. No royalties were paid, and no prices were ever fixed (R. 421). Nor did Kearney exercise its right of cancellation (par. 18 of Ex. 16, R. 643, 648–649). It is obvious, therefore, that there was a collateral agreement concerning the coming into effect of Kearney's 1938 license.

2. After the letter in question, Kearney did not participate in the negotiations for some time.[*] It was not represented at the June 1939 meetings in New York nor was it directly advised of what was done there (Exs. 49–51, R. 703–708).

Its next contact with the situation was a letter from General Electric in July (Ex. 53, R. 711, quoted *supra*, p. 14), inviting it to be present at the forthcoming meeting on August 10, because of the introduction of the Kyle patent "into the situation, which considerably broadens the effect on the industry." This invitation was accepted (Ex. 54, R. 712; see R. 720[**]), and Harrington reported fully to Mr. Kearney, Sr., what was said and decided (Ex. 58, R. 721).

Harrington's letter, the only contemporaneous account of the August 10 meeting, is particularly significant in showing the industry's appreciation

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[*] The record shows one colorless letter from Line to Kearney, apparently unacknowledged, in April 1939 (Ex. L–6, R. 1811).

[**] For "Keamey, Hamington" read "Kearney, Harrington."

of the need for including the Kyle wet process porcelain housing patent in order to effectuate price control in the dropout fuse industry (R. 722):

> In the beginning no one was interested in taking a license under the wet process patent but Kyle advanced the argument that price control would be impossible under the licensed patents unless this patent was included. He pointed out that a new company coming into the industry, or one of the companies now in the cutout field which did not have a license under the drop-out patents, could bring out a non-dropout switch housed in a porcelain box, and with such a device could completely upset the price arrangement established by the licensor under the licensed dropout patents. However, Kyle argued, if the wet process patent is included among the licensed patents, such a manufacturer would go into the non-drop-out field knowing that it was faced with an immediate infringement suit.[*]

The net result of the meeting, reported Harrington, was that all of the other manufacturers, in greater or less degree, indicated their willingness to take licenses, including licenses under the Kyle wet process patent, and that "The Lemmon-Kyle group and the General Electric representatives were to stay over in New York to work out

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[*] For a complete discussion of the relationship of the Kyle patent to the present price-fixing combination, see Point VII, *infra*, pp. 106–119.

the details of such an agreement" (R. 733; and see *supra*, pp. 14–15, 18, and U. S. Br. 15–16). So far as Kearney was concerned, it shortly afterwards advised all the other prospective licensees who had attended the meeting that (Ex. 60, R. 726),

> our company is willing to go along with the other prospective licensees on an agreement which would be mutually satisfactory to all parties involved with the proviso that the details of the type of contract adopted must be entirely satisfactory to the Kearney Corporation.

3. Thereafter, the license negotiations proceeded more rapidly, with General Electric and with Kearney (see Ex. 75 at R. 754). In November 1939, Line sent revised drafts to Kearney, together with a copy of the General Electric agreement then under discussion (*ibid.*); the letter pointed out the cancellation clause relative to the Kyle patent in the latter draft, noting (R. 757) that "Obviously the effect will be substantially the same as though price regulation had been provided for."

Harrington, replying (Ex. 82, R. 777), made further suggestions for changes, and indicated Kearney's concurrence with the Matthews proposal (R. 779)—

> that the contracts include provisions permitting the licensees to inspect the books of the licensor, and of Southern States

> Equipment Corporation, to determine whether or not those parties are maintaining prices * * *."[*]

Harrington also insisted on the basic Kearney "all-or-none" idea, namely (R. 779):

> It is to be understood, as proposed by Mr. Brown of your company, that in the event the Kearney Corporation signs a license agreement before the other parties interested in the matter also sign agreements, the Kearney Corporation shall receive an instrument in writing based on a consideration, providing that the Kearney Corporation shall not be liable to payment of royalties on any licensed devices sold by it until the other interested parties have signed agreements and are required to pay royalties in accordance therewith.

The record shows no further progress towards an agreement for five months. Then, in April

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[*] Binding the licensor had long been a favorite point with Kearney. As far back as June 1938, Crump had reported (Ex. 13, R. 636):

> The writer questioned Mr. Lemmon as to his sincerity in maintaining published prices on this type of equipment and whether or not he would be agreeable to a penalty clause in an agreement, whereby the licensor, as well as the licensee, would be subject to the same penalty should they submit a quotation other than published prices. He stated he would be agreeable to such an arrangement.

And paragraph 13 of the 1938 agreement had bound Southern to maintain prices under the license it granted Kearney (Ex. 16 at R. 647). And see R. 115, 414.

1940, Line advised Kearney that General Electric had signed, and urged that Kearney likewise sign (Ex. 114, R. 875). Kearney took no action. Line continued its urgings, and in June wrote Kearney of its negotiations with Matthews (Ex. 140, R. 946). Line stated that certain of Matthews' suggested revisions had been agreed to, that Matthews' escrow plan had also been accepted "so that the agreements would not become effective until at least two other competitors in addition to General Electric, Line Material, Southern States, and Matthews have executed license agreements under the same patents" (R. 946). And Line's attorney added (*ibid.*),

> Mr. Kyle asked me to advise you that all of these arrangements are available to you and we will be glad to redraft your agreement to include the insertions and give you benefit of the escrow.

Included in those arrangements was the right of the licensee to inspect the licensor's books to determine whether the licensor was maintaining prices (R. 947). Copies of the escrow papers and of a revised release executed by Southern (Ex. 141, R. 948) were inclosed (R. 948), and the Line-Kearney agreement was executed by Line on June 12, 1940 (Ex. 142, R. 949, 958).[30]

But Kearney was not yet prepared to sign; it

[30] Southern signed the cancellation of the 1938 license on June 14 (Ex. 143, R. 960, 962).

seized this strategic opportunity to suggest a further price-fixing plan, this time under a Kearney patent. Before Kearney will sign the Line license, wrote Harrington (Ex. 148, R. 988), it insists on a settlement of Line's infringement of Kearney's "Trip-O-Link" patent. Harrington reviewed the negotiations relative to that matter and said (R. 990),

> During the time the negotiations were being carried on relative to the licenses under the drop-out patents Mr. Kyle advanced many arguments as to why the license agreements should be entered into, pointing out that the financial gain to the licensors was secondary inasmuch as the real beneficiary of the license arrangement would be the industry as a whole because of price stabilization. Every argument advanced by Mr. Kyle in favor of entering into the drop-out licenses applies with equal force to entering into licenses in connection with Kearney patent No. 2,086,028, inasmuch as at least five manufacturers are now manufacturing and selling this type of cutout.

Harrington concluded by remarking that the matter of the Kearney patent presented an opportunity for Line to prove its sincerity as to "its asserted desire to benefit the industry as a whole by settling various pending patent controversies * * *" (R. 990).

Line replied with some asperity that no such condition had ever been raised before as a prerequisite to Kearney's taking a license from Line (Ex. 154, R. 1006). Line referred to Kearney's then recent telephone assurances that it would sign, noted that Matthews and Railway had already placed their signed agreements in escrow, and stated that "In full reliance upon your representations to us, Railway & Industrial Engineers executed and forwarded their agreement to Mr. Hill," the escrow agent (R. 1006–1007). Line again urged signature, promising to continue negotiations in respect of the Kearney patents, and submitting proposals relative thereto (R. 1008–1009).[n]

Kearney signed a few days later, on July 3, 1940 (Ex. 142 at R. 959; Ex. 143 at R. 963), and placed the executed agreements into escrow (Ex. 157, R. 1012 [see I R.ix, II R.vii, for name of writer]; Ex. 158, R. 1012). This signature bound six manufacturers, and the escrow agent duly made notification that the conditions of the escrow had been met and that the deposited agreements were therefore effective (Exs. 164–168, R. 1022–1031).

4. It is apparent from all of the foregoing that Kearney signed a license in 1938 because of the

[n] Line eventually took a license from Kearney which provided for price stabilization, the provisions of which are summarized in Ex. 264, R. 1236–1237.

representation and inducement that all the other manufacturers would sign a similar agreement, and that there was a definite collateral undertaking that Kearney would be under no obligations under that license until and unless the others were likewise obligated. The documents proving the inducement are, as has been noted, corroborated by the later oral testimony of Lemmon, Southern's president, and Brown, Line's attorney (R. 140–141; 135–136). And the collateral agreement is even more strikingly corroborated by the fact that when Kearney refused to pay royalties under the 1938 agreement, on the ground that Southern's representation had failed to materialize, Southern acquiesced; it neither sued for royalties nor to enjoin infringement. And no royalties were ever paid under the 1938 license. Kearney did not cancel the license, as it might have done (par. 18 of Ex. 16, R. 643, 648–649); it simply repudiated all obligations under the license, with the consent of the licensor. Consequently, the testimony of Crump, more than six years later, that there was no understanding when the 1938 agreement was signed that it was not to become effective immediately upon signature (R. 415), that Kearney did not care how many manufacturers came in (R. 420), and that there never was any understanding of any kind with any of the licensees or licensors dehors the written instruments (R. 423), is, at the very least, uncon-

vincing."[22] *Per contra,* the letters of Harrington are accurate and precise; they were intended, when written, to set forth his client's position; we submit that they bind that client now and, in addition, bind those whose contemporaneous silence indicated a total lack of disagreement with what he had written.

It follows that Finding 25 (R. 511–512), which attributes Kearney's 1938 license largely to patent considerations without mention of more, and Finding 32 (R. 514), to the effect that there were no agreements apart from the written licenses, are "clearly erroneous"; and that the Government's proposed Amended Finding 25 (R. 524), which states that Kearney "accepted the license offered by Southern containing price control provisions with the understanding that all other cut-out manufacturers would shortly be bound by identical price control provisions," and its proposed Additional Findings 3A and 4A (R. 527), which set out that understanding in greater detail,

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[22] Crump is technically correct in saying that the 1938 agreement was "kept in force" until Kearney signed with Line in 1940 (R. 421), since it was not actually cancelled until then (Ex. 143, R. 960). But from any realistic point of view the 1938 license was a dead letter after, at the latest, Harrington's letter of repudiation in March 1939 (Ex. 38, R. 689; *supra*, pp. 51–52).

The same comment applies to the testimony of Brown of Line, who said (R. 213; cf. R. 205–206) that, when the escrow became effective, Kearney was subject to price control and to a license.

correctly reflect the evidence, and should have been made.

5. For the convenience of the Court, we discuss at this point the preparation of the price schedule and its policing insofar as Kearney was involved in both activities.

(a) Line sent to Kearney in August 1940 the price list attached to the agreements, viz., Schedule A (Ex. 181, R. 1053). Kearney participated in the discussion that ensued, by letter (Ex. 194, R. 1083; Ex. 197, R. 1107; Ex. 312, R. 1339; Ex. 317, R. 1344; Ex. 321, R. 1351; Exs. 327–330, R. 1363–1369; Ex. 341, R. 1381; Ex. 346, R. 1389), and at the September 1940 conference (R. 512). Kearney in particular was insistent on the importance "of setting up a fair and equitable price structure on the cartridges. * * * We are asking only that the structure be logical and we assure you that you can dispel from your minds any idea that this peculiarity of our construction will work to the disadvantage of the subscribers of the contract" (Ex. 328, R. 1365).

(b) Kearney had complained to Line of a competitor's low bid even before the price schedule went into effect (Ex. 315, R. 1342), and a little later, still before the effective date, it complained in similar vein (Ex. 321, R. 1351, 1352):

> We have no information as to the effected date of the proposed Compilation. We were under the impression that all licensees should be operating under the agreement

at this time. However, several sealed bid openings disclosed that some licensees have a different understanding.

(c) After Schedule A became effective, in January 1941, there were more complaints; some were made by Kearney and policed by Line (Exs. 406–407, R. 1572–1573; see Ex. 479, R. 1659); some were complaints by Line to Kearney, after a competing licensee had called the matter to Line's attention (Ex. 436, R. 1610, which was based on Ex. 435, R. 1609; Exs. 419–420, R. 1591–1592; see Ex. 427, R. 1600). Kearney pursued price cutters meticulously; on one occasion it inquired of Line (Ex. 480, R. 1660),

> Are your licensees instructed to drop fractions of a cent or carry them to the next higher cent?

(d) In respect of two items, Kearney felt that the schedule could not be justified. It objected to the May 1941 change in prices, saying (Ex. 372, R. 1453):

> Your decision to make a 5% differential between dropout and non-dropout cutouts leaves us only one alternative. As you may know, the only difference between these two cutouts in our design is in the use of a pin in the locking mechanism. Now for us to try to convince our customers that we are justified in asking 5% less on a non-dropout when they can see plainly that the situation should be reversed would be

> to place us in a ridiculous position. The only sensible explanation we could offer would be that this was done under our Licensor's instructions and this would certainly reflect unfavorably on your company.[83]

On another item, Kearney's 12143 cutout, licensor and licensee argued for over two years, orally, in writing, and in their respective laboratories, whether this particular device should be priced at the 50 or the 100 ampere valuation. Line finally prevailed in its insistence on the higher price (Exs. 444–454, R. 1618–1633; Ex. 484, R. 1664).[84]

(e) Like Matthews, Kearney also encountered Line's zeal for fixing jobbers' resale prices.

Line complained to Kearney of a successful Kearney bid for cutouts some $73 below the fixed price (Ex. 420, R. 1592). Kearney replied that the order had been taken by a jobber, adding (Ex. 421, R. 1593):

> We quoted and billed this job at the regular published prices and discounts and the cut price must have come about through the jobber giving away part of his discount. This cut, if it existed, as your letter indicated it did—was not initiated or encouraged by our company.

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[83] Compare Matthews' annoyance at a $10 price differential based on a cost difference of 50¢, *supra*, p. 43.

[84] For further details regarding this controversy, see R. 258–262.

> We have found many cases similar to this occurring in the past and we have reported them to you from time to time. We have also voiced the wish that this situation could be legally corrected because it is certainly a weakness.

This did not satisfy Kline, Line's sales manager (Ex. 422, R. 1594):

> It would seem to us that if you received the order for the 185 cutouts through a jobber, regardless of the fact that you quoted and billed this jobber at the regular published prices and discounts, you legally could ask your jobber representative to advise you in regard to the price they used in quoting the job.

Kearney replied (Ex. 485, R. 1665),

> * * * As we explained to you we received our regular published prices from the jobber who took this order and as you well know—this is as far as we can legally go in a matter of this kind.
>
> As to what prices the jobber offered or the basis on which it was offered, we don't know, nor is it easy for us to determine. It may have been lumped with several other items, but we are not certain.
>
> We regret very much, Karl, that we can't give you all of the information that you'd like to have on a transaction of this kind. We know that it is similar to many other cases that have come up throughout the country and we know also from experience

that your other licensees have had the same difficulty in tracing down information of this kind without violating existing statutes.

It is interesting to note that Line's brush with Kearney as to controlling jobbers' prices occurred about fourteen months after tis argument with Matthews on the same subject (*supra*, pp. 43–44), and after its own lawyer is said to have advised it of the illegality involved (R. 285).

IV. WHEN THE LAST FOUR APPELLEES ADHERED TO THE LICENSE ARRANGEMENTS, THEY DID SO WITH FULL KNOWLEDGE THAT ALL OTHER MANUFACTURERS HAD ALREADY TAKEN SIMILAR LICENSES, AND UNDER CIRCUMSTANCES WHICH UNDERSCORE THE BASIC PRICE-FIXING PURPOSE OF THE COMBINATION

Under this heading we consider the circumstances under which the appellees Pacific, Porcelain, Johnson, and Royal became parties to the license arrangements.[28]

Appellees in their brief seek to minimize the importance of these four companies, because of their small production (R. 502), and because of their nonparticipation in the 1939–1940 negotia-

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[28] The position of Railway is not separately discussed as it appears throughout this supplemental brief. See pp. 6–8, 12–13, 39,-42, 60, 84–85, 138, 143, 151. Westinghouse and Schweitzer & Conrad (Fdgs. 23–24, R. 510–511; cf. proposed Amended Fdgs. 23–24, R. 523–524), present special variants, none of which in our view warrant extended consideration. It is apparent, however, that representatives of both Westinghouse and Schweitzer & Conrad attended all meetings and participated equally in the agreements reached.

tions (Line Br. 18n., 45n.). There are, we believe, several answers to such cavalier slurring over of these concerns. For one thing, their aggregate production was greater than that of Matthews (R. 502), which admittedly played a substantial part in the negotiations. For another, Line considered the four companies just named sufficienlty important to make it worth while to gain their adherence to the combination. And, even more important, is the circumstance that the methods used to effect the adherence of these companies to the price-fixing combination emphasize and throw into sharp relief the dominant price-fixing purpose of that combination.

We shall deal separately with each of the four companies.

1. *Pacific.* As we have already indicated under Point II, *supra,* pp. 40-41, when Pacific learned from Matthews of the latter's signature, it inquired (Ex. 178, R. 1049) whether "all the interested parties have signed up with them [i. e., Line and Southern]. If they have, it seems to me that if we want to get in on this agreement I had better write them for a copy of the license agreement and sign it up." Matthews in reply said (Ex. 179, R. 1050), "we feel certain that Line Material has no thought of attempting to exclude your company from the advantages of similar agreements," and sent Line a copy of this reply. Line thereupon sent copies of agreements to Pa-

cific (Ex. 180, R. 1051), advising it in detail who had signed similar agreements and with which manufacturers negotiations were still pending. When Line finally, some months later, forwarded signed copies for execution, it advised Pacific (Ex. 211, R. 1121) that "This agreement contains all of the provisions that other licensees have requested * * *." Southern similarly advised Pacific (Ex. 214, R. 1122). When Pacific delayed signature,[36] Line continued to press for action, stating once more that five companies were already licensed and that two others were about to be signed (Ex. 215, R. 1123). Pacific soon after executed a like agreement (Exs. 212–213, R. 1122; see Ex. 216, R. 1124).[37]

2. *Porcelain.* Porcelain had been in touch with the negotiations from the outset, though not a participant in them,[38] and had been sent by Line copies of the license agreements being offered (Ex. 70, R. 743; Ex. 100, R. 860). In June 1940, Line wrote Railway (Ex. 145, R. 985), saying (R. 987)—

> We have not approached Porcelain Products, but will do so as soon as

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[36] Due, unbeknownst to Line, to Pacific's vice-president's absence from his office. Ex. 216, R. 1124.

[37] We discuss below, pp. 102–106, Line's subsequent effort to force Pacific to raise prices on its cutout ER–3, an item not covered by the patents in the license, as Line duly acknowledged at the time of the negotiations (Ex. 211, R. 1121; see R. 178).

[38] See Ex. 58 at R. 723; Ex. 59 at R. 724–725; Ex. 113, R. 874.

> Matthews, Kearney, and you are licensed, and we will insist upon a reasonably quick conclusion of negotiations.

By August of that year Line felt sufficiently sure of Porcelain's signature to call on it for catalogues and price lists, and to invite it to attend the September 1940 classification meeting (Ex. 185, R. 1054).

Porcelain did not attend, doubtless the reason for Line's president, Kyle, telephoning Owen, who headed Porcelain, in the middle of September (see Ex. 202, R. 1112). After that call, according to Owen (*ibid.*),

> * * * I began to look the file over and there are so many contracts in the file that I am honestly all balled up and do not know which to sign and which not to sign. Will you, therefore, please send me an up-to-date contract.
>
> I want the contract which you send me to be just like the other boys have. If the one you send me isn't like that which everyone else has, then you are just going to be in for a peck of trouble during the life of the agreement. I want to repeat again—please give me the same contract as the other fellow has. I don't want any more and I won't take any less—it has got to be identical. I think you told me in Zanesville that a new set of contracts were being prepared—that anyone could reach into the

> kettle and pull one out and it would be exactly the same as the other fellow's. You will pardon me for making suggestions to you about how to run the thing but, as I say, unless all the contracts are identical, it won't work. I will sign as soon as I know what to sign.

Line then forwarded new contracts, clearly marked, showing which of these had been signed by the other licensees (Ex. 205, R. 1115). But Porcelain was slow to move, and Kyle once more prodded (Ex. 208, R. 1120), advising that the Westinghouse negotiations had been satisfactorily concluded, and adding,

> I am asking you to sign up that contract now and send it back to me like you advised me previously and then we will have matters cleaned up 99% to go ahead, which will be profitable, I believe to everybody concerned.

This time Porcelain signed (Exs. 209–210, R. 1120).

3. *Johnson.* In April 1943, at a time when Line was engaged in a discussion with Schweitzer & Conrad which eventually resulted in litigation (see R. 195, 436–437; Exs. S&C–22 and S&C–23, R. 2081–2083), and in consequence of being prodded by Schweitzer & Conrad, Line took up with Southern the matter of Johnson's infringement of the Lemmon-Schultz patents. After referring to earlier correspondence, Line wrote (Ex. 274, R. 1273–1274),

> Whatever the facts may be, it appears that Johnson is infringing and we can no longer ignore this. We are now trying to induce Schweitzer & Conrad to pay royalties on their open type "Semafor" and they have asked what we expect to do about Johnson.
>
> Our dropout licenses require that we prevent infringements. Consequently, we will have to act against Johnson if he is unwilling to take a license.

Southern replied (Ex. 275, R. 1275) that "we still feel that the Johnson matter has dangerous possibilities," and hence advised caution, particularly because "We have seen a blue print of one of the Johnson drawings dated at a time prior to our date of conception of the double-jointed hinge principle."[*] And Southern continued (R. 1275):

> Lawsuits are an old story with Johnson and he has ample funds personally to carry a suit to a conclusion. If we should prosecute him in a Southern court the result might easily be the invalidation of important claims in our patent 2,150,102 and your patent 2,176,227. Such a decision would upset the whole situation.
>
> So far as we know, Johnson makes relatively few fuses, and we understand that his prices are at least as high as ours. The latest reports we have indicate that his business has been seriously curtailed by

[*] See Ex. 35, R. 686.

present conditions, and that his principal activity at present is to act as local agent for the Locke Insulator Company.

Our agreement with Licensees requires us to protect them from serious competition, but Johnson's competition is certainly not now serious.

Considering all the above, we believe that it will be inadvisable to proceed actively against Johnson as an infringer of our patents.

Line, however, was insistant that something be done. It wrote (Ex. 276, R. 1277):

In the subject controversy, however, we are faced with a situation where Johnson's publications definitely show structures which not only infringe our main patents but also numerous other of our patents. We are now faced with this fact in our present controversy with Schweitzer and Conrad where it appears that we are going to be forced to sue S&C in order to collect royalties on their open type Semafor fuses. Naturally, S&C have asked us, and we believe rightfully so, what we are doing about the obvious Johnson infringements and we believe that unless we can give S&C a satisfactory answer, we just have not much chance of settlement on the Semafor situation.

Your opinion that Johnson does not make enough fuses to be any serious threat may be correct. However, aren't we faced with

> a situation that may suddenly become serious and require an answer to the query "What are we going to do about it?"

After reviewing the evidence, Line continued (R. 1278–1279):

> From the foregoing, it appears that Johnson is infringing seven of the Line Material patents and at least three of the Southern States patents.
>
> With only the foregoing facts before us we just cannot see any good reason why we should permit this infringement to continue. There certainly is nothing in the above history which would justify any such position. We believe, therefore, that we should get all the facts with reference to Johnson's developments in order that we can proceed with the proper protection of ourselves as well as our licensees.

Line therefore asked Southern to collect information bearing on the validity of Johnson's claims, saying (R. 1279), "We believe it is up to us to get the facts and see whether Johnson is telling the truth or merely bluffing * * *."

Southern, however, apparently still apprehensive over the possibility of a lawsuit, suggested conferring with Johnson instead (Ex. 278, R. 1281). A conference in fact took place in May 1943 (Ex. 279, R. 1282), at which Johnson seems to have been persuaded, for in June Line sent him executed copies of the agreement (Ex. 281, R. 1284) which Johnson signed within ten days (Ex.

282, R. 1286, 1297; Ex. 283, R. 1298).[40] Signature was followed by payment of back royalties (Ex. 284, R. 1300) and by correspondence looking to Johnson's compliance with the price provisions of the license (Exs. 285–286, R. 1301–1302; Ex. 288, R. 1305).

Line's inspection of Johnson's schedule resulted in a demand that he raise his prices on a number of items (Ex. 291, R. 1308–1309):

> It will be noted that in many cases there appears to be considerable difference between the list prices of Line Material dropouts and Johnson's dropouts. For instance, on page 9 under item 7 Line Material's net price is greater than Johnson's list price. Under no conditions should the net selling prices of the Johnson dropouts be less than the net selling prices of the Line Material dropouts similarly classified.
>
> * * * * *
>
> Of course we have no objection to a licensee listing prices which are greater than Line Material's, but we do object when we have the reverse situation which is the case as illustrated in item 5, page 6 of the schedule.

And Line called on Southern for help in raising Johnson's prices (Ex. 292, R. 1310):

> It is our thought that you may wish to personally go over this schedule with

[40] Johnson knew when he signed that all of the other major manufacturers had signed similar licenses (R. 606).

Mr. Johnson to ascertain what adjustments may be made without violating the spirit of the price set-up.

For instance, Mr. Johnson lists his TDO–5 at $21.00 and states that it is comparative to item 1, page 4; item 1a, page 5; and item 5, page 6 of the schedule. This doesn't seem possible. If the TDO–5 drop-out is comparative to item 5, page 6, then its list price should be no less than $25.50 even though it may be sold in competition with other items.

Southern found Johnson cooperative, furnished him with a chart showing how his prices could be adjusted to Line's (Ex. 295, facing R. 1312), and reminded him (Ex. 294, R. 1312), "I believe you will find that the results are more than worth while from your standpoint."

The chart completely satisfied Johnson. He wrote Southern (Ex. 296, R. 1313), "It is so clear that I can understand it," asked for a similar tabulation for fuse tubes, and added, "I do not see that it is necessary to write Brown, it seems to me that all I have to do now is to follow the blueprint." Southern forwarded a copy of this letter to Line (Ex. 299, R. 1316), with its explanation of why Johnson did not write Line:

> * * * He has always been wary of doing anything which might be criticized by the Government, and he hates to go on record if it can be avoided. But since he has signed the agreement and now has your

price schedule, I feel confident that he will live up to the conditions imposed by the license.

4. *Royal.* Royal apparently made inquiry of Line regarding a license at about the time Johnson signed one, for in July 1943, Line replied, advising Royal of Line's requirements. This was in wartime, when prices were stabilized. Line's letter (Ex. 287, R. 1303) is particularly significant for its bearing on appellees' argument here that the license agreements involve primarily an attempt to protect the patents covered therein. Line did not say, "We will license you and then you must raise prices"; instead it said, "If you can raise your prices, then we will license you." And it is significant that this was said to a manufacturer which had never been approached before, either by way of threat to prevent further manufacture by injunction against infringement, or with a suggestion that it take a license. The pertinent excerpts are sufficiently important to warrant extended quotation (R. 1303–1304):

> You have inquired as to the possibility of obtaining a non-exclusive license under the above-noted patents. Before we can answer your question we must ascertain whether, under present conditions, your client can comply with all of the provisions of the license agreement which would be acceptable to the Line Material Company.

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In all license agreements heretofore granted by Line Material under the above-noted patents, one of the conditions is that licensees will not sell licensed products comparable to Line Material products at prices and on terms and conditions more favorable than those established from time to time and followed by Line Material in its sales.

According to our information, your client has been selling infringing fuses at prices and on terms and conditions of sale more favorable than Line Material's for comparable fuses.

As you know, the government has stabilized prices and it occurs to us that your client may now be prevented from complying with provisions such as above required.

All licenses under the above noted patents provide that in the event we grant more favorable terms to other licensees, we will grant such more favorable terms to all other licensees. Obviously, if your client is to be permitted to sell at prices, terms, and conditions more favorable than Line Material's, all other licensees would be likewise privileged and our protection would be completely nullified.

Under these circumstances we must have positive assurances that your client is not, under present conditions, prevented from complying with the provisions of the license agreement which we may be otherwise willing to grant. We feel that the answer is as important to your client as it is to us, for if a license is granted and your client is un-

> able to comply with the provisions of the agreement, the agreement would be canceled and the license terminated.

Line closed (R. 1304) by listing its ten licensees, and later sent Royal's lawyer a copy of the recently executed Johnson license (Ex. 289, R. 1306) and a request for Royal's price lists (Ex. 290, R. 1307).

Some time thereafter, in order to assist Royal in obtaining permission to raise prices (Ex. 297, R. 1314), Line sent Royal a letter signed by Kyle, which said in pertinent part (Ex. 298, R. 1315):

> Our chief concern is whether your client can comply with the provisions of the proposed license agreement wherein Line Material Company reserves the right to establish minimum prices, terms, and conditions for sales made under the agreement, and with the schedule of minimum prices, terms, and conditions established by Line Material Company under those provisions.
>
> Upon receipt of assurances from your client that it will be permitted to adjust and will adjust its prices, terms, and conditions of sales in compliance with the license in question, Line Material Company will grant a license to your client embodying the provisions set forth in the copy of the license agreement granted to Johnson Manufacturing Company of Atlanta, Georgia, which we forwarded to you under date of July 12, 1943.

In due course, Royal's lawyer replied (Ex. 301, R. 1318), advising that,

> "I have taken up with the O. P. A. the matter of obtaining permission for my client to raise the price of its cut-outs in order to meet the terms of your license. The O. P. A. informed me that that can be done under its regulation MPR 136, provided we lower our price on some other article in such an amount as to counterbalance the increase in price in the cut-outs. * * *

Once the necessary approval from the Office of Price Administration was forthcoming (see Exs. 302–305, R. 1319–1322), Royal signed, in March 1944 (Ex. 306, R. 1323, 1334; Ex. 307, R. 1334).

Other licensees were duly notified by Line of Royal's and Johnson's signing (Exs. 309–311, R. 1336–1338).

V. THE MEETINGS BETWEEN THE PATENTEES AND THE LICENSEES SUBSEQUENT TO THE EXECUTION OF THE LICENSE AGREEMENTS WERE INTENDED TO AND DID IN FACT FIX PRICES

The sequence of events in connection with the establishment of a uniform price schedule is set forth in both briefs originally filed (U. S. Br. 27–30; Line Br. 18–21, 55–58), and is not in substantial controversy. The differences between the parties narrow down to the accuracy of Finding 28 (R. 512–513; see proposed amended Finding 28, R. 524–525), and to the effect, with

reference to price fixing, of what the parties did.

1. There are six differences between Finding 28 as made and as the Government moved to have it amended. We state each divergence and follow it with a discussion of the evidence.

(a) The district court found (first sentence, R. 512) that in August 1940, Line sent to the other licensees a copy of its Schedule A and requested them to submit "a description" of its licensed cut-outs. The Government asked that the finding be amended to read, "a description *and price lists*" (R. 524).

Line's letter to Kearney (Ex. 181, R. 1053) included this paragraph:

> We ask that you kindly return this tabulation to us not later than August 30, together with duplicate copies of your catalogue sheets listing these items of your manufacture, together with duplicate copies of latest price schedules.

Identical letters were sent to Matthews (Ex. 182, R. 1053), General Electric (Ex. 183, R. 1053), Railway (Ex. 184, R. 1054), and Southern (Ex. 186, R. 1055). Porcelain and Westinghouse, which had then not yet signed licenses, received slightly different letters, which however also requested "duplicate copies of your most recent price schedule" (Ex. 185, R. 1054; Ex. 187, R. 1056).

It is accordingly obvious that the finding is "clearly erroneous" in this particular, and that

the requested amendment should have been made.

(b) The Government moved to amend the fifth sentence of Finding 28 by adding the italicized words which follow, so that the sentence would read (R. 512, 525), "The discussion was confined to Line's proposed classification and comparison with its own cutouts of the many types of cutouts manufactured by the several licensees *for the purpose of arriving at uniform selling prices for all licensees.*"

This involves an inference, of course; but as we point out below, pp. 85–92, in more detail, it is obvious that the sole purpose of the September 1940 meeting was to establish uniform selling prices. Clearly that meeting was not called simply to secure conformity in abstract classification.

(c) The Government moved to amend the sixth sentence of Finding 28 by adding the italicized words which follow, so that the sentence would read (R. 512, 525), "There was no discussion of any specific price or prices to be established by Line for cutouts, *but prices were to be based upon the classifications determined upon at the conference.*"

Same comment.

(d) The difference in the seventh sentence of Finding 28 is that whereas the district court found that after the September 1940 meeting Line prepared a new Schedule A showing "Line's prices" for comparable devices (R. 512), the Gov-

ernment requested that there be substituted the words "the proposed prices" (R. 525).

Obviously, under the terms of the license agreements, Line's prices became every licensee's prices. Cooley of Matthews expressed the situation perfectly in the circular he sent his salesmen in January 1941, when the price provisions of the licenses went into effect (Ex. 342 at R. 1383):

> For your further information, since Line Material Company, as licensor, has issued similar license agreements to all the other Cutout manufacturers, they are also issuing similar new schedules which all these other Cutout manufacturers must put into effect on January 18, according to the terms of their license agreements with Line Material Company.

(e) The Government requested that, immediately following the seventh sentence of the original finding (R. 513), there be inserted (R. 525) "Final drafts of such schedules were prepared after comments had been received from recipients of the drafts."

The record contains numerous such comments, some written before the October 31 revision (Exs. 312–313, R. 1339–1340), most of them afterwards (Exs. 319–321, R. 1346–1352; Exs. 323–324, R. 1354–1356; Ex. 328, R. 1365; see Ex. 333, R. 1373). Line replied in detail (Exs. 325–327, R. 1357–1364; Ex. 332, R. 1371), and invited additional comments (Ex. 329, R. 1366, and Ex. 331, R. 1370,

both inclosing Ex. 330, R. 1367; see R. 242). It is therefore clear that the requested modification should have been made.

(f) The Government requested the elimination of the last two sentences of Finding 28, viz., "There was no discussion at that meeting [January 23, 1941] of any price or prices to be established by Line for cutouts. The prices listed in Schedule A are Line's own selling prices, determined solely by Line without discussion with or advice from any other defendant" (R. 513, R. 525).

There was testimony that future prices were not discussed at the January 1941 meeting (R. 385), and that the price schedule which Line had already established was not considered (R. 483). But the meeting was called (Ex. 218–223, R. 1126–1127)—

> for the purpose of explaining the requirement made in the schedule of prices effective January 18, 1941, under licensees' agreements granted for fuse cutouts, and for the further purpose of answering any questions which pertain to the enforcement of provisions of the agreements and schedule of prices thereunder.

It also was called to consider exemptions from the price schedule based on contracts which were in effect at the time the schedule became effective (*ibid.*). This brought a mild protest from Railway (Ex. 343, R. 1384–1385);

> * * * As we understand the agreement, no sales are exempt from the price schedule which you submit as part of the agreement. However, we do know that certain other licensees have agreements which cannot be withdrawn and, therefore, there will be some exceptions to the price schedule which you have sent out.
>
> We certainly want to follow your price schedules exactly in accordance with our agreement but at the same time we do not expect to be asked to follow it fully when certain other competitors and licensees are granted exemptions from your price schedule. We feel that you should send us a complete list of all exemptions from this effective price schedule and then make a definite date for accepting orders at this schedule rather than delivering.

Consequently the first sentence of the two now under question is hardly material to any realistic consideration of the case, and the second sentence objected to is clearly wrong, as the numerous references under item (e) show.

It follows that Finding 28 should have been amended as requested, and that the second part of requested Additional Finding 6A (R. 528) should also have been made.

2. The more basic issue on this phase of the case is whether the classification meetings concerned prices. Appellees contend that they did not, urging that (Line Br. 55) the meetings in question "relate to classification of devices" and "came

about as a normal and necessary means for fair administration of the price provisions in the licenses". Further, say the appellees (Line Br. 55), the exchange of classification data was "not for the purpose of price-fixing, but purely to assure fair treatment as between licensees and to give Line, the licensor, the information it needed properly to exercise its patent rights."

That is to say, if Line prices cutout *ab* at $6 and cutout *cd* at $9, and a licensee lists cutout *xy* at $7, then a discussion whether *xy* should be placed into the *ab* group or into the *cd* group is purely an exercise in applied electrical science, actuated only by a passion for consistency and accuracy in classification, without any possible relation to price. Appellees would have the Court believe that if, in such a case, *xy* was in fact equivalent to *cd*, Line would be perturbed only by the resultant scientific inexactitude and not by the obvious commercial fact that item *xy* could and would undersell item *cd*.

Appellees of course entertained different views at the time of the transactions here in question. Cooley had written Line in July 1940 (Ex. 172, R. 1038), "Any time that you call a conference to discuss the administrative features of these agreements and their price control provisions, we will be prepared to attend." And, as he later testified (R. 381), "one of the chief points in the price control provisions was the establishment of a schedule A with its proper classification of

the different categories of products coming under the patents, and their prices by the licensor."

Another answer to appellees' present argument that these meetings were not held for the purpose of price fixing is the two-year-long running fight between Line and Kearney as to Kearney cutout 12143 (*supra*, p. 65). True, the discussion was couched in terms of rupturing capacity: was this model a 50 ampere or a 100 ampere cutout? But the substantial controversy between the parties was whether Kearney would be permitted to sell item 12143 at a lower price.

The same is true as to Line's dealings with Pacific and Johnson; the correspondence shows conclusively that Line was interested in classification because and to the extent that it bore on price.

Consider Line's letter to Pacific in November 1941 (Ex. 271, R. 1267, 1269–1270):

> In order to be fair with our other licensees, we must insist that you correct your ratings and corresponding prices to agree with our tabulation, or if it is your intention to maintain your present higher rupturing capacities as listed in your sheets, then it is necessary that you increase your prices on complete units and parts over the values shown in the tabulation. We are not at this time telling you how much the prices should be increased on cutouts for a rupturing capacity beyond the range shown in our tabulation, but we consider

that such an increase should be substantial and in keeping with the lower ratings on which we have now established prices. We do want to point out that where we have set a rupturing capacity, say of 1,000 amperes, and your tabulation shows 1,500 amperes, according to the schedule your prices should automatically take the next higher listing, or the 2,000 ampere rupturing capacity rating listing."*

Or take Line's letter to Johnson in August 1943, telling Johnson how to adjust its prices (Ex. 291, R. 1308, quoted *supra*, p. 75). We quote a further excerpt (R. 1309):

As explained on the first page of the schedule of terms and conditions of sales,

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* See the explanation of the foregoing, given by Kline, who wrote the letter (R. 286-287):

"In our basic schedule there are definite standards that are used. As a matter of fact, all manufacturers operate—have operated for years under standards as to voltage, amperage and rupturing capacity. The voltage is the rating of the line, we will say; the current is what it will normally carry successfully, and the rupturing capacity is the shot that it will take successfully without destruction. Well, following that practice, a definite classification of costs with subsequent prices are established. It is our belief from our own experience when the rupturing capacity is increased beyond a recognized standard rupturing capacity for which the schedule provided, that you have to build considerably heavier to take care of the increased rupturing capacity, and as a result you have added costs which must be reflected in your selling price. It was with that in mind that we wrote the licensee in question suggesting that if his rupturing capacity was of the size that he mentioned, that our assumption was that it would carry additional costs or additional charges for it."

a dropout having a rupturing capacity greater than that of any given classification will fall in the classification having the next highest rupturing capacity irrespective of other characteristics which may comply with classifications having lower rupturing capacities.

Under our schedule a dropout must not be sold at prices less than that indicated for a comparative dropout of the same ratings and capacity, regardless of whether the dropout may serve at lower ratings and/or lower capacity. As we view the matter, a dropout must fall within a given single classification and cannot come within another classification without material change in its structure, such change warranting the differential in prices between the different classifications."

An even more striking illustration is found in the memorandum prepared by Steinmayer of Line (Ex. 330, R. 1367–1369; see explanation at R. 359–360, 362, 312), which was sent to all the licensees (Ex. 329, R. 1366; Ex. 331, R. 1370; R. 242). This memorandum shows very specifically and graphically, how, in fact, despite obstacles—"Because of lack of information on your cartridge costs, it was difficult to check out these proposed tabulations as compared with your existing listings"—how, in detail, one single competent engineer actually fixed prices for an entire indus-

" See also Ex. 292, R. 1310, quoted *supra*, pp. 75–76; cf. Ex. 290, R. 1307.

try by computing classifications based on rupturing capacities, ratings, and single, double, and triple shot cutouts.

Another example is found in the Schedule which Line sent to all the licensees in January 1941 (Ex. 354, R. 1403; see par. 1 of Ex. 352, R. 1399). Line said (R. 1403):

> It is the licensors practice where devices are not wholly covered in the descriptive classification but come within the range of (a) ampere rating, (b) flashover voltages, or (c) rupturing capacities, to consider such devices within the next higher class of apparatus with corresponding limitations.
>
> Example 1: A cutout having 75 amperes carrying capacity but in all other ways complying with a 50 ampere rated cutout will fall in the 100 ampere class, all other limitations notwithstanding.
>
> Example 2: A cutout having a rupturing capacity of 1500 amperes but in other essentials complying with a device having 1200 ampere rupturing capacity will fall in the 2000 ampere rupturing capacity class, all other limitations notwithstanding.

As Kline, Line's sales manager, put the matter frankly on the stand (R. 230, 234):

> Q. Did you assign any different prices depending upon the different rupturing capacities?
>
> A. Eventually, after considerable study, it was decided that the heavier duty cutout with the higher rupturing capacity, even

though it had the same basic voltage and amperage rating, was in a higher priced classification.

Q. Did that require the manufacturer to increase his price?

A. Not necessarily, but the heavy duty cutout did involve added costs over the standard cutouts. You had to build heavier as to contacts and your tubes and the parts, and it was only logical in that particular device, or one comparable to it, whether we built it or the other fellow, that the price was higher than the standard item.

* * * * *

Q. Would the classification determine the price?

A. I believe it would because the classification is based on standards and it has been common practice in the industry to set their prices based on the classification under the standards.

But it is unnecessary to belabor the point. Obviously, the only purpose of the classification meetings was to effectuate price control. There was no point in holding these meetings otherwise; accord in classification without corresponding price accord would have been meaningless. The difficulties encountered only went to document the doubts early recorded by Bobst (R. 335), "whether price control could really be made effective in an industry of this kind," and by Wilson (R. 431), "I had a good deal of feeling that the administration of price control in this type of

apparatus would be quite different because of the variations in specifications and the variations in type of market through which these things had to be sold." Appellees' apparent suggestion (Line Br. 55) of a distinction between price-fixing on the one hand, and "normal and necessary means for fair administration of the price provisions in the licenses" or "to assure fair treatment as between licensees and to give Line, the licensor, the information it needed properly to exercise its patent rights," on the other hand, is a verbalism divorced from reality and wholly devoid of substance.

VI. APPELLEE LINE POLICED PRICE VIOLATIONS ON BEHALF OF ALL THE LICENSEES, PURSUANT TO AGREEMENT; IT ATTEMPTED TO FIX RESALE PRICES; AND IT UNDERTOOK TO SUPPORT PRICES BY INDUCING APPELLEE SOUTHERN TO PROCEED AGAINST ANOTHER LICENSEE FOR INFRINGEMENT OF A PATENT NOT COVERED BY THE LICENSE AGREEMENT

The differences between the parties under this heading relate to the district court's finding (No. 31, R. 513-514) that there was no fixing of resale prices by any of the defendants, and that "there was no joint action by way of policing or otherwise taken between the licensor and the licensees, or any of them, and there was no agreement among the various licensees, either with Line or Southern or among themselves, that they would assist in policing the industry" (*ibid.*; cf. Amended Fdg. 31, R. 525-526); in the court's failure to make Finding 10A (R. 529), to the effect that the adherence of

such defendants to the fixed prices stated in the schedule was pursuant to a mutual agreement among all of them that each would adhere to such prices; and in the court's failure to make Additional Finding 11A (R. 933), which was, *inter alia*, that "Price violations were reported to Line and Line policed the fixed prices on behalf of all defendants by reason of a mutual agreement among them that Line would do so on behalf of all."

A. LINE POLICED PRICE VIOLATIONS ON BEHALF OF ALL THE LICENSEES, PURSUANT TO AGREEMENT

The overwhelming evidence compels the conclusion that Line policed the price provisions in pursuance of an understanding which it had with the others, and which it had had since the outset; the mass of correspondence in the record is meaningless on any other assumption.

The typical policing action followed a consistent pattern. First, a licensee who considered that he had been undersold would complain to Line, giving such details of the alleged violation as were available.* Line, shortly thereafter, would report the complaint to the alleged violator, sometimes asking for investigation and sometimes peremptorily directing that corrective action be

* Ex. 408, R. 1378; Ex. 416, R. 1377; Exs. 418–419, R. 1380–1382; Ex. 427, R. 1600; Ex. 428, R. 1603; Exs. 430–431, R. 1602–1603; Exs. 441–442, R. 1615–1616; Ex. 457, R. 1626; Ex. 462, R. 1622; Ex. 490, R. 1660; cf. Ex. 491, R. 1604 (complaint of violation by Line).

taken.[46] On some occasions Line sent general policing letters, calling for compliance with the price provisions of the license agreements without mention of specific violations localized as to item, time, or place.[47] When, as was more usually the case, the letter to the alleged violator referred to specific instances, the licensee which had originally forwarded the complaint was duly advised that Line had taken corrective action.[48] These reports of action were on occasion accompanied by reassurances, e. g., "We trust that our complaint will have the effect of eliminating situations of this kind in the future" (Ex. 407, R. 1573), or "We thank you for bringing these matters to our attention, and assure you if any discrepancies exist they most assuredly will be corrected without delay" (Ex. 458, R. 1637). The alleged violator, for its part, was undoubtedly aware that Line's complaint was based on the report of a competitor licensee,[49] and on several occasions the licensee com-

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[46] Ex. 263, R. 1235; Ex. 408, R. 1574; Ex. 417, R. 1589; Ex. 420, R. 1592; Exs. 428–429, R. 1601–1602; Ex. 436, R. 1610; Ex. 438, R. 1612; Ex. 443, R. 1617; Ex. 456, R. 1635; Exs. 461–462, R. 1640–1641; Ex. 464, R. 1643; Ex. 469, R. 1648; Ex. 482, R. 1662.

[47] Exs. 418–419, R. 1590–1591; Ex. 423, R. 1595; Exs. 425–426, R. 1597–1599; Ex. 487, R. 1667.

[48] Ex. 262, R. 1234; Ex. 407, R. 1573; Ex. 430, R. 1603; Ex. 433, R. 1606; Ex. 437, R. 1611; Ex. 458, R. 1637; Ex. 483, R. 1663.

[49] Two letters so state in terms. Ex. 464, R. 1643; Ex. 471, R. 1651.

plained against replied by complaining of the actions of others."

Finding 31 in its present aspect involves an inference from the foregoing facts: Did Line engage in this policing by agreement—or as a matter of coincidence? We submit that in the light of the documentary evidence it is impossible for any reasonable person to conclude that Line's policing of the price-fixing combination took place in any manner otherwise than by agreement. Why forward the complaints to Line except on the understanding that Line would do something about them? Why should Line report on the action taken and offer assurances of corrective measures except pursuant to an understanding? Why reply on a *tu quoque* basis if there was no such understanding? Matthews assured its salesmen that Line was putting price revisions in effect, for Matthews and "all the other Cutout manufacturers" (Ex. 342, R. 1382, 1383); why risk such an assurance except with an understanding in respect of policing? Or take Cooley's explanation why he reported price violations to the licensor: "It was purely and simply an effort on my part to protect my own company's business" (R. 389). It is reasonable to suppose that he would have forwarded report after report unless he had an agreement with Line that Line would take some action on those reports?

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[11] Ex. 431, R. 1604; Ex. 439, R. 1613; Ex. 475, R. 1654, 1656.

True, the understanding was a tacit one; it was not spelled out in writing with particularity; but certainly the six original licensees who received Line's invitation to the January 1941 meeting (Exs. 218-223, R. 1126-1127) could not have been in much uncertainty or suspense when they read (R. 1126):

> This meeting is called by the Line Material Company for the purpose of explaining the requirement made in the schedule of prices effective January 18, 1941, under licensees' agreements granted for fuse cutouts, and for the further purpose of answering any questions which pertain to the enforcement of provisions of the agreements and schedule of prices thereunder.
>
> * * * * *
>
> Licensor needs the lists [of contracts for the sale of licensed devices which it is believed are exempt from the scheduled prices effective January 18, 1941] to enable it to properly administer the agreements. Some, but not all, have complied with our request. If you have not already given us your list, please bring it to the meeting.[48]

The district court's finding of no joint action and no agreement taxes credulity; it is "clearly erroneous."

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[48] Line added, it may be by way of afterthought, that "This meeting is called for the sole purpose of protecting our rights under our patents numbered 2,176,227 and Reissue 19,449." Cf. R. 169-170.

B. LINE ATTEMPTED TO FIX RESALE PRICES

The evidence with reference to Line's inclination to fix resale prices involving dealings with three licensees.

(1) The first, in the summer of 1941, concerned Westinghouse.

In July, a Line memorandum to its President (Ex. 470, R. 1649) [40] listed "cases in which Westinghouse distributors are responsible for quoting prices other than those established in the license schedule price sheet." The memorandum concluded (R. 1650),

> All of the above are reports on closed transactions which have been reported to Mr. P. F. Squier. We have had no replies from him on any of these cases. It seems very evident that the jobbers are the disturbing factor and that these jobbers should be controlled by some rigid ruling. There is nothing we can do on any of the above except accept it with the understanding that the situation will be corrected.

A week later, Kyle transmitted the complaints to Westinghouse (Ex. 471, R. 1651):

> We gave to Mr. Spratt a record of how your companies are cutting prices on fuses. These cut prices are on regular bids that everybody can see. In some cases prices

[40] Apparently written, from the internal evidence, by Kline, Line's sales manager.

are cut 1¢ and in other cases a 2% cash discount is being given.

If your Mr. Spratt has not seen you, will you get this list from him. Also will you please let me know if your jobbers and distributors are going to maintain prices on fuses. Please let me know if you will take this action as other fuse manufacturers are rightfully complaining about the cut prices your companies are making.

Westinghouse replied, deferring specific comments for the time being, but noting that "It takes time to break people of bad habits" (Ex. 472, R. 1652). The paragraph in full reads,

> I assure you that we are endeavoring to get this cutout situation straightened out. I think you appreciate that for a long time cutout prices on the type of bid you refer to, have been far from regular. None of the cases Mr. Kline has referred to me have come from districts where prices in the past have been the most irregular. It takes time to break people of bad habits.

A little later, Westinghouse commenced replying to the specific complaints made by Line. As to Oklahoma (Ex. 474, R. 1653), "our St. Louis Manager states that in most cases reported to him, Wesco" did not maintain the prices due in general to the bad competitive situation which exists in the entire state of Oklahoma * * *"

" Westinghouse Electric Supply Co.

In a more complete reply in September (Ex. 475, R. 1654), Westinghouse dealt with Line's complaints seriatim. As to one sale, made by Wesco in Oklahoma City, "Their only argument is that cutout prices in general had been below regular and if they did not cut they would not get the business" (R. 1654). In another instance, the distributor, Nichols Electric Co., claimed that they understood the Westinghouse salesman to have said $4.96 on the telephone when he in fact said $4.97. Westinghouse wrote Line (R. 1655), "They have been told that they must maintain cutout prices or that no cutout business will be handled through them." Another case evoked the comment (R. 1655), "The man who made the quotation in this particular case, simply made an unintentional error as he looked at the cost, rather than the Selling Price. I think he has learned a lesson and will not make the same mistake the second time." And the letter, after discussing two other instances, closed with a price-cutting complaint directed at General Electric and at one of Line's jobbers (R. 1656).

Earlier there had been correspondence between Westinghouse and Line as to the classification, for discount purposes, of Westinghouse's Agent-Jobbers. The letters cannot be fairly summarized, hence we quote their substance in full.

Westinghouse inquired (Ex. 476, R. 1657):

> In your Schedule of January 16, 1941, classification (1) is for Electrical Jobbers

without contract agreement, and that shows 10% and 5%. Classification (4), Electrical Jobbers under exclusive sales contract agreement, shows 10 and 5% and 10%.

All of our Agent Jobbers are under our Agent-Jobber contract agreement. We also have other distributors who are under written agreement with us but are not signed under the Agent-Jobber agreement, and for those we use the Wholesaler sheet. We sell to no Jobbers without the contract agreement.

It seems, therefore, that both of these classes of Jobbers with us would be under classification (4).

I wish you would immediately give me a ruling on that.

Line replied (Ex. 477, R. 1658):

In our opinion the agent-jobber is the only one who qualifies for a discount of 10-5% on shipments to stock and 10% on direct shipments. An agent jobber, as we understand it, is one who under contract agreement agrees to handle your company's complete line to the exclusion of other manufacturers comparable products.

The electrical wholesaler, in our opinion, although operating under a written agreement, is nothing more than an ordinary jobber, and the agreement you have provides a certain earning for him in the event he sells your products. In our opinion, therefore, the electrical wholesaler should receive but 10% on shipments to his

stock and 5% on shipments direct to the customer.

These last two letters are significant in the light of Westinghouse's subsequent attempt to explain its relationship to the distributors referred to in Line's price-cutting complaints. Westinghouse's letters on this subject (Ex. 472, R. 1652; Exs. 474–476, R. 1653–1657) were written by Squier, a sales executive, in 1941; they are silent as to the relations between Westinghouse and its distributors. But in 1945, Stratton, a patent lawyer, testified that the companies mentioned were "agents" (R. 466–467). The agency contracts were not offered in evidence, the record does not show that Line was ever advised that the distributors in question were "agents," and the quoted letters as to "Agent-Jobbers" show the artificiality of the attempted distinction between "agent" and "jobber" for purposes of determining the legality of price-fixing under the Sherman Act. Cf. *United States* v. *Masonite Corp.*, 316 U. S. 265.

(2) Line's next attempt to control resale prices occurred in January 1942, in connection with a low bid by one of Matthews' jobbers; the details are set forth above, pp. 43–44. It was in connection with this incident that Kline testified (R. 285) he undertook no further efforts to fix resale prices, on the advice of Line's counsel.

(3) Fourteen months later, however, Line attempted to get information concerning price cutting by one of Kearney's jobbers; for the details, see pp. 65–67, *supra*. This time the advice to

desist came from the licensee, not from the licensor's lawyer.

We think, therefore, that the documentary evidence shows unquestioned attempts by Line to control resale prices, and that in the case of Westinghouse some success may have attended the endeavor.

C. LINE UNDERTOOK TO SUPPORT PRICES BY INDUCING SOUTHERN TO THREATEN PACIFIC WITH A SUIT FOR INFRINGEMENT OF A PATENT NOT RECITED IN THE LICENSE AGREEMENTS

Nor were Line's policing activities restricted to items covered by its license agreements.

In June 1941, Line wrote Southern transmitting a comment made by Wagner of General Electric to the effect that appellee Pacific's dropout ER–3 was being sold at the price of the Kearney Trip-O-Link cutout (Ex. 251, R. 1225). This ER–3 model, Line had specifically assured Pacific prior to Pacific's signing, was not included within the license Line was offering (Ex. 211, R. 1121; see R. 178). Now, seven months later, Line was suggesting to Southern that, with this identical device, Pacific might be infringing a Southern patent not covered by the licenses, and hinted at action to improve prices under patents that were covered by the licenses. Line said (R. 1225):

> If the Pacific dropout ER–3 continues to be offered at this price, the prices at which licensed dropouts under our patents are sold will be seriously affected and also the amount of royalty collected under the li-

cutout will be reduced in direct proportion.

I call your attention to claims 14 through 20 and 25 of your patent 1,821,761 which should be considered with reference to the Pacific dropout ER-3. If this patent is enforceable against Pacific, it should be utilized to maintain proper competitive prices with reference to dropouts, otherwise the price situation with reference to dropouts manufactured under our patents will be seriously affected.

A contemporaneous inter-office memorandum by the writer of Line's letter to Southern articulated Line's concern, and forecast Line's methods of meeting the danger (Ex. 252, R. 1226):

Mr. Wagner is concerned about the Pacific "Snapout" Type ER-3 dropout which he states is offered at the price of the Kearney Trip-o-Link cutout.

He is correct in stating that the Pacific dropout ER-3 does not come under the Pacific license agreement or the patents above noted.

Mr. Steinmayer and I discussed this yesterday and I believe it was Mr. Steinmayer's suggestion that you talk with Mr. Wagner and inform him that Southern States has a patent which covers the Pacific dropout ER-3, that Mr. Lemmon's attention was called to this fact before Pacific signed the license under our patents, and that we are again calling Mr. Lemmon's attention to the Pacific dropout ER-3 and suggesting action in view of the potential

danger of disturbance in prices of dropouts.

We do not wish to write all this to licensees under our patent for the reason that we do not wish it to appear that there is any collusion in harassing a competitor.

Southern took the hint, and sent Pacific a notice (Ex. 255, R. 1230), claiming infringement of its patent 1,821,761 (Ex. S–17, R. 1799), which was not included in any of the license agreements, and offering a new license in respect thereto. Upon notification that Southern's letter had been sent, Line's lawyer advised Line's sales manager (Ex. 256, R. 1231),

> It would be my advice that you mention this to Mr. Wagner only in personal conversation. We should not have any written record that may appear as though we are in collusion with Southern States with reference to any of Southern States patents under which we do not have any rights for the purpose of licensing others.

Pacific, through its lawyer, denied infringement (Ex. 258, R. 1233). Southern forwarded the denial to Line (Ex. 257, R. 1232)—"the old argument with which you are familiar, and it seems best to continue the discussion along commercial lines." Southern continued (R. 1232).

> They have lost business to the Tripolink design, and their ER–3 Cutout is being used to meet that competition. It would be well if we could persuade Mr. Sixtus to bring out a Tripolink design to meet that

particular competition, rather than to cheapen the standard dropout design as they are now doing.

Please let us have a memorandum of the Tripolink situation, somewhat as indicated on the enclosed sheet.

In reply (Ex. 264, R. 1236), Line explained the price stabilization license which it had from Kearney on the Trip-O-Link patent (see pp. 59–60, *supra*), and supplied Southern with arguments in support of the contention that Southern's patent was being infringed by Pacific's device (R. 1236). The meeting which thereafter took place between Southern and Pacific "was not conclusive" (Ex. 263, R. 1239), and the record closes with a double and simultaneous assault on Pacific by Line and Southern both: Southern's lawyer wrote Pacific's lawyer a stiff letter—stop infringing or take a license under our patent (Ex. 270, R. 1265), while Line, writing on the same day, objected to a number of Pacific's price listings (Ex. 271, R. 1267). This is the letter, already quoted in part at pp. 57–58, *supra*, wherein Line said (R. 1269–1270):

> We are not at this time telling you how much the prices should be increased on cutouts for a rupturing capacity beyond the range shown in our tabulation, but we consider that such an increase should be substantial and in keeping with the lower ratings on which we have now established prices.

All of the foregoing letters and memoranda save the last one were written for Line by Brown, its patent attorney. Yet four years later this same corespondent testified in open court (R. 208) that Line never attempted to control prices on any devices not covered by its own patents.

On the whole matter discussed under this point, we think it clear, in summary, that Line policed prices, that it did so pursuant to agreement, that it attempted to fix resale prices, and that it was not above using another licensee's patents in order to maintain prices on articles under its own patents.

VII. APPELLEES UNLAWFULLY AGREED AMONG THEMSELVES TO COMBINE THE UNRELATED KYLE PATENT WITH THE LEMMON-SCHULTZ PATENTS IN ORDER TO EFFECTUATE THEIR PLAN TO FIX PRICES UNDER THE LATTER

The district court found (Fdg. 30, R. 513) that—

> Line never made the use of its patented wet process porcelain box or the taking of a license under its Kyle patent Re. 19,449 a condition precedent to an infringer obtaining a license under the double hinge dropout fuse patents. Line offered, at the option of the licensee, licenses under the double hinge dropout patents alone, but restricted to open dropout fuse cutouts, or under the double hinge dropout patents and Line's enclosed cutout patents including Kyle Re. 19,449.

The first sentence of this Finding ignores a whole series of letters, and the phrasing of the second sentence conceals the vital point that Line refused to grant licenses under the Lemmon-Schultz patents to manufacture enclosed cutouts unless the licensee was also prepared to accept a license under the Kyle patent.

1. It may be convenient at this juncture to recall the nature of each of the patents involved.

Those of Lemmon and Schultz, owned respectively by Southern and Line, relate to the manufacture of a double-hinged dropout fuse cutout whether the cutout be open or housed. The Kyle patent relates to the use of a wet process porcelain for housing a cutout, whether it be a dropout or any other kind. There is no necessary relationship between the two, although of course a dropout fuse cutout may be housed in a wet process porcelain box, in which event the invention of all three patents may be utilized in the production of a single cutout.

2. As early as May 1939, Kyle of Line had written Lemmon of Southern (Ex. S–13, R. 1791) "that it is going to be easier for you to negotiate patents under our mutual agreement with other companies providing the porcelain box is included in your negotiations." Line's views were elaborated in the next few days (Ex. S–16, R. 1797; Ex. L–4, R. 1810), and on June 6, when Line met with General Electric, the latter representing the

five manufacturers who had attended the June 1 meeting in New York (*supra*, p. 8), Line broached the desirability of combining the three patents. Wagner of General Electric, reporting this to the other companies, noted that (Ex. 51, R. 707) Kyle "interjected another element, for which he argued strongly, namely—the inclusion of his wet process box patent in the agreement, with provision for royalty and price control." Wagner reported that Kyle was willing to take a substantially lower royalty on the dropout fuses if the porcelain box patent were included (R. 708). Because the introduction of the Kyle patent into the situation "considerably broadens the effect on the industry," a new meeting was considered necessary, to which Kearney, which had not been present in June, was invited (Ex. 53, R. 711).

It was at the ensuing meeting on August 10 that Kyle, according to the sole contemporaneous account of the meeting, advanced the reasons why his porcelain box patent should be included (Ex. 58, R. 721, 722):

> In the beginning no one was interested in taking a license under the wet process patent but Kyle advanced the argument that price control would be impossible under the licensed patents unless this patent was included. He pointed out that a new company coming into the industry, or one of the companies now in the cutout field which did not have a license under the

drop-out patents, could bring out a non-drop-out switch housed in a porcelain box, and with such a device could completely upset the price arrangement established by the licensor under the licensed drop-out patents. However, Kyle argued, if the wet process patent is included among the licensed patents, such a manufacturer would go into the non-drop-out field knowing that it was faced with an immediate infringement suit."

General Electric shortly afterwards advised the other prospective licensees who had been present at the meeting (Ex. 59, R. 724) that "if the other manufacturers involved took up proposition (b)"—license under the dropout patents including the Kyle wet process patent—"we would sign a separate agreement under the wet process patent on the basis of ½% royalties without price control."[28]

It was about this time that Schweitzer & Conrad's attorney expressed concern that price-fixing under the Lemmon-Schnitz patents would not work because of the competition of "certain non-

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[27] Brown of *Line*, testifying six years after the meeting, said that he did not recall Kyle's making these statements (R. 149-150). Harrington, author of the memorandum, though present in court (R. 94, 150), was not called as a witness.

[28] We have already pointed out, *supra*, pp. 30-31, that, while the General Electric licenses under the Kyle patent did not provide for price control, they did contain 90 day cancellation clauses which, Line assured the other licensees, were substantially equivalent to price control, and which the others so interpreted.

controlled apparatus" (Ex. L-7, R. 1813).* But Line reassured him (Ex. 68, R. 737). "If proper licensing arrangements are made, it seems quite feasible to secure effective price regulation" (R. 738). And Line continued, emphasizing the effect of the Kyle patent (R. 739):

> 7. It is possible that price regulation under the Kyle-Lemmon group of patents may be affected by the sale of unprotected fuses. Nevertheless, if provisions are not made for stabilization of prices of fuses coming under the Kyle-Lemmon group, confusion in prices of such fuses will result. Price regulation under the Kyle-Lemmon group will at least stabilize prices of fuses sold thereunder and at least to this extent will benefit the industry.

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*The gist of the letter is in the following excerpts (R. 1813–1814):

> 4. From what I understand, the entire field of drop-outs and repeaters would not be covered by the Kyle-Lemmon group of patents. That means that certain non-controlled apparatus or equipment would compete with price controlled apparatus or equipment. That will not work out.
>
> 5. The only situation where price control will work out is where there is a definite article or device covered by a patent, and there is no near substitute for that article or device. Then, and only then, is price fixing worth the attempt.
>
> * * * * *
>
> 7. My mind is open on the question of the Kyle-Lemmon license, assuming that it is a workable setup. If it is good for the industry and good for S & C, I would not say a word against it. * * *

> The proposed licenses submitted to Mr. Lockwood provides for price regulation under Kyle Re. 19,449 for Fuse Boxes. *If this provision is accepted, the most serious obstacle to effective price regulation of dropout fuses is removed.*" [Italics added.]

Unless the several prospective licensees were, as we contend, motivated by an intention to effect price-fixing in respect of dropout fuses, it is difficult to comprehend their willingness to take licenses under the Kyle patent as well. For nine years prior to the licensees' agreement, as Kyle himself testified (R. 303), he had made vigorous

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"Letter written by Brown (R. 741), who on the witness stand some six years later questioned Harrington's record of Kyle's statement (*supra*, pp. 108–109) "because it doesn't seem to fit the facts" (R. 149). Compare Brown's "explanation" of the same letter, in response to leading questions put by Line's lawyer (R. 210–212), of which the following question and answer is a fair sample (R. 211–212):

"Q. On page 3 of the same Exhibit 68, the next-to-the-last full paragraph, you state, "The proposed license submitted to Mr. Lockwood provides for price regulation under Kyle reissue 19,449 for fuse boxes. If this provision is accepted, the most serious obstacle to effective price regulation of dropout fuse is removed." Now, will you state what you had reference to by that statement?

"A. That, I think, refers back again to our refusal to grant licenses on housed dropouts and either directly or indirectly permitting licensees to use the Kyle re-issue patent. In other words, as far as licensees are concerned, they had to obtain the right to use the dropout patents and also the Kyle patent, and it seems to me I had in mind that the obstacle is that it removes all controversy as far as we are concerned if it is settled."

efforts to persuade other appellees to recognize the validity of his porcelain box patents, but his efforts had been uniformly unsuccessful. The two leaders of the industry, General Electric and Westinghouse, were convinced that the Kyle patent was of very doubtful validity (R. 318–319; Ex. W–13, R. 2302, 2304; Ex. GE–60, R. 2003), and in fact litigation over the Kyle patent was pending in 1939 between Line and General Electric, in which the latter was asserting the invalidity of the patent (Ex. GE–32, R. 1957, 1961; Ex. GE–33, R. 1963, 1965).[**] That litigation was not settled until General Electric acknowledged the validity of the Kyle patent by taking a license thereunder (R. 194–195; Exs. 109–114, R. 870–875; Ex. GE–62, R. 2006).

3. When Line's efforts to obtain licenses in accordance with the agreement reached on August 10 resulted in further bargaining as to definitive terms, Line passed from persuasion to coercion in getting prospective licensees to accept inclusion of the Kyle patent. It refused to grant unrestricted licenses under the Lemmon-Schultz patents unless the Kyle patent were also included. Its position, clearly and forcefully expressed, was that the

[**] It was stipulated below (R. 71) that "The validity of the United States letters patent involved in the licenses of the defendants is not contested by the plaintiff in this action, and therefore is not here in issue." Whatever the scope of this stipulation, it obviously does not preclude the Government from showing that the defendants themselves considered some of their patents to be of doubtful validity.

Lemmon-Schultz patents would be licensed only for the manufacture of open cutouts unless the license included the Kyle patent. Line's letters on this point are unequivocal (Ex. 74, R. 750, 752; Ex. 75, R. 754, 757; Ex. 77, R. 762, 764; Ex. 78, R. 765-767; Ex. 96, R. 817, 818; cf. Ex. 76, R. 758, 759). Brown wrote to Harrington, for instance (Ex. 75, at R. 757):

> Refusal of any licensee to accept a license under the fuse box patent, will of necessity compel us to refuse a license to that licensee to manufacture and sell housed dropout fuses.

And to Cooley of Matthews (Ex. 77, at R. 764)—

> We do not intend to grant any licenses to make housed dropout fuses unless the proposed licensees accept a license under the wet process porcelain box patent. Refusal to accept a license under the wet process box patent will mean that we will grant licenses only to make the open type dropouts.

Line's consistent attitude, concretely applied, also meant that Westinghouse, had it refused to accept a license under the Kyle patent and accepted the Lemmon-Schultz patents under the restrictive terms offered, would not have been able to make dropout cutouts enclosed in the Prestite housing it was then developing. And Westinghouse was left in no doubt as to Line's position (Ex. 76, R. 758, 759; Ex. 206, R. 1117, 1118). In the letter

last cited, written in October 1940, Line said flatly (R. 1119):

> Article V, paragraphs (a), (c), and (d) have been changed to include the Kyle Reissue patent 19,449. It is our position that this patent must be included in this Article, otherwise Line Material Company cannot grant a license under patents, 2,150,102; 2,176,227; and Re. 19449.
>
> * * * * *
>
> If Westinghouse wishes to avail itself of the privileges proposed to be granted, it must accept Article V with the provisions thereof applicable to the Kyle Reissue patent 19,449.

Consideration of Westinghouse's position in this connection—and Westinghouse did not want price control under the Kyle patent (Ex. W-29, R. 2332, 2333) though eventually it yielded (Ex. W-30, R. 2335; Art. V (a), (c), (d) of Ex. 234, R. 1179, 1185–1187)—shows the actual coercive effect of Line's combining its two unrelated patents.[*]

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[*] All of Line's letters insisting on the inclusion of the Kyle patent as a prerequisite for licensing hooked dropouts were written by Brown. The unreliability of Brown's subsequent recollection is reflected by comparing the letters quoted in the text with the following excerpt from his testimony, under questioning by Line's lawyer (R. 905):

> Q. Now, Mr. Brown, did Line Material ever refuse to grant a license under the open dropout patents, namely, Lemmon and Schultz?
>
> A. No, sir.
>
> Q. They in no way made acceptance of a license under

And the coercive effect of continuing the Kyle patent for the housing with the Lemmon-Schultz patents for the dropout fuses is reflected also by the testimony of Bobst, General Electric's patent lawyer (R. 349):

Q. Why were you willing to enter into a license agreement on the Kyle patent which had a cancellation provision like that?

A. That was the only terms we could obtain from the Line Material and while we didn't like the idea of the licensor being in a position to cancel, we were willing to take the risk in order to get the license under the dropout fuse cutout patents and clean up the entire situation.

4. Appellees apparently rely upon the form into which the licenses were eventually cast to establish that Line did not utilize its several patents in coercive combination (Line Br. 38).

It is true that, through agreement among the parties reached at their October 1939 meeting in Chicago, Line offered prospective licensees a choice of either (i) a single license embracing all three patents, or (ii) two licenses, including, respectively, the Lemmon-Schultz and the Kyle patents (Exs. 71–72, R. 744–746). But the circumstance that the licensees thus had a choice of sorts, and that separate licenses were prepared to

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those patents conditional upon acceptance of a license under the Kyle reissue 19,449?

A. No, sir.

cover the Lemmon-Schultz and the Kyle patents cannot obscure the fact that a separate license under the Lemmon-Schultz patents was not available separately for any manufacture of housed dropouts (Exs. 74-78, R. 750-765; Ex. 98, R. 817; Ex. 100, R. 860; Ex. 180, R. 1051; Exs. 205-206, R. 1115-1118). The eventual form of the licenses resulted from dickering about the royalty rate and did not in any respect alter Line's insistence that licensees desiring unrestricted rights to Lemmon and Schultz were required to accept the Kyle patent as a condition thereof."

6. Appellees suggest (Line Br. 86-88) that Line was solely concerned to see that no license under the Kyle patent passed by implication to licensees of Lemmon-Schultz, and that Line therefore required that licensees who housed the dropout cutouts in a wet-process porcelain (*i. e.*, Kyle patent) box also accept a license under Kyle. But this was not Line's position. What Line said and repeated, as appellees themselves strangely emphasize, is—

> We do not intend to grant any licenses to make *housed* dropout fuses unless the

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" The difference between the inclusive agreement and the two separate agreements consisted in the varying royalty rates specified (see Ex. GE-71, R. 2023; Ex. 97, R. 854). The two separate agreements were drafted as an alternative to the inclusive agreement to cover Matthews' situation (R. 870; Ex. 77, R. 762, 764) and were actually signed only by Matthews among the licensees other than General Electric.

proposed licensees accept a license under the wet process porcelain box patent. Refusal to accept a license under the wet process box patent will mean that *we will grant licenses only to make the open type dropouts.*"

It is true (Line Br. 87n.) that both Johnson and Royal were offered unrestricted licenses under Lemmon-Schultz only. But since neither of these manufactured any housed cutouts (Ex. 7 at R. 601, 602), Line's failure to mention the Kyle patent in this connection is not indicative of a change in the basic position which Line so strongly expressed to the other licensees. It was this factor rather than the small production of Johnson and Royal (R. 502) which led Line to refrain from mentioning the Kyle patent, for in case of Pacific, a smaller manufacturer than Royal (R. 502), Line had stated that a license under Lemmon-Schultz would not be granted unless a license under Kyle was also accepted (Ex. 180, R. 1051).

6. Appellees also contend (Line Br. 86) that the Government's position as to the Kyle patent is completely answered by the circumstance that it expressly limited its charge of unlawful price-fixing to "dropout fuse cutouts and their parts" (R. 67–68). But obviously the Government's

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"Ex. 77, R. 762, 764; the italics are appellees' (Line Br. 87). For similar expressions, see the other letters cited above, pp. 113, 116.

[illegible] that it did not abandon unlawful price-fixing under the Kyle patent does not prevent its [illegible] that patent when combined with the Lemmon-Schultz patents to make price-fixing under them effective.

7. It follows then, as a matter of fact, that both the Kyle and the Lemmon-Schultz patents were used to implement the ethyl although there was no necessary relationship between their subject-matter, and that Playing Possum (R. 513) is, as the Government urged below (R. 525, 533), against the evidence. Line used the coercive power of its Lemmon-Schultz patents to force acceptance of its Kyle patent, and it utilized the Kyle patent to ward off competition with devices manufactured under the Lemmon-Schultz patents and to effectuate industry-wide price control under the latter devices.[*] And, perhaps even more significant in this connection than Line's coercive combination of patents, is the circumstance that the six major licensees accepted licenses under the Kyle patent by agreement among themselves in order that price-fixing under the Lemmon-Schultz patents might be more effective.

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[*] We have already shown above, pp. 102-104, how, when Pacific was offering a octane not covered by any claims of the three licensed patents at prices which threatened the price structure of cheapest four octanes, Line, at the prodding of General Electric and others, suggested that Southern utilize certain claims of one of Southern's patents to compel Pacific to raise prices.

And it follows, as a matter of law, that Lane's offer to license the Lemmer-Schantz patents for both open and hooked contacts only if the Kyle patent were included violated both the antitrust laws and the public policy expressed in the patent laws. "The lawful individual monopolies granted by the patent statutes cannot be unitedly exercised to restrain competition." *Standard Oil Co. v. United States*, 283 U. S. 163, 174. One patent cannot be used to exploit another any more than it can be used to exploit an unpatented article. *Ethyl Gasoline Corp. v. United States*, 309 U. S. 436, 459. The patentee may not use the power of his patent "in such a way as to acquire a monopoly which is not plainly within the terms of the grant." *Morcoid Corporation v. Mid-Continent Investment Co.*, 320 U. S. 661, 665–666; see also *Morton Salt Co. v. Suppiger Co.*, 314 U. S. 488, 493. And plainly nothing in the patent laws justifies the group agreement, reflected by the present record, to combine patents in order to achieve effective price-fixing.

VIII. THE SEVERAL LICENSE AGREEMENTS AND THE TRANSACTIONS HERE IN QUESTION WERE PRIMARILY AND DOMINANTLY MOTIVATED BY A DESIRE TO EFFECT PRICE CONTROL IN THE DROPOUT FUSE INDUSTRY.

The dominant and consistent thread which runs through this entire case is Lane's desire—which it ultimately achieved—to price-fix the entire dropout fuse industry. Neither that desire nor the achievement nor the methods by which the

which were translated into deeds was evidenced in the findings of the District court.

A. THE PLAINTIFF MADE THE SUBSTANTIAL PRICE CONCESSIONS WHICH WERE CONTRARY.

As early as April 1936, Line had offered Schweitzer & Conrad a license under its patent 1,991,064 for repeater fuses (reissued as Re. 21,562, Ex. L–27, R. 1865) on the condition, *inter alia* (Ex. S&C–3, R. 2046–2047):

> Any license agreement entered into under the above-noted patent, shall be the basis for price controlling arrangements on all repeater fuses, if and when the principal competitors of Line Material and Schweitzer & Conrad agree to similar price controlling arrangements.

In December 1937, Line suggested a settlement of patent differences to Southern so that "a very substantial position might be presented to the industry as a whole" through the "nucleus of a cross-license agreement" (Ex. 8, R. 613). And, later, after a memorandum of agreement had been signed (Ex. 10, R. 616), Line wrote Southern that it had in mind "ultimately arriving at a set-up which will make it easier * * * to bring about stabilization in the dropout fuse and repeater fuse field" (Ex. 11, R. 618, 622). The words "substantial position" and "stabilization" are meaningless in connection with patent protection; there is no "substantial position" or "stabilization" simply through that exclusion of

private rights the patent right carries; these restrictions are intelligible only when coupled with and used in connection with a price-fixing scheme."

The next step, to implement the plan, was taken in 1933, when Kearney was induced to take a license on the representation that Southern, which was acting as licensor under the Line-Southern agreement, would shortly afterwards sign the balance of the dragout fans industry to similar licenses containing uniform price-fixing provisions. When that inducement failed to materialize, Kearney repudiated the license, and Southern acquiesced in the repudiation. That evidence is fully discussed above, pp. 46-54, and will not be repeated here. Southern neither sued Kearney for patent infringement nor for royalties due; on the contrary, it undertook to make good on its representation by renewing its efforts to bring the industry into a price-fixing combination.

When the other manufacturers, meeting together, concluded that they would not take further steps to invalidate the Southern-Line patents, they agreed to seek the best terms they could in respect of royalties, knowing that to take licenses necessarily meant price-control of the industry. Accordingly, negotiations commenced, with General Electric, the largest manufacturer,

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* It is for this reason that we cannot agree with appellees (Line Br. 26-28) that these quotations were used out of context in our original brief (U. S. Br. 9).

[redacted]

[redacted]

[redacted]

(44) Line's apparently incompatible urge to fix prices is explained also as a revealing incident in connection with the General Electric license under the Kyle patent, which, as has been noted (pp. 30-31, *supra*), did not provide for price control but had instead a cancellation clause. None the less, Line attempted to fix prices under that license.

"In November 1941, Line determined to raise prices 7½% on dropout cutouts and 5% on non-dropouts, effective December 1, 1941, and letters and schedules directing the increase were prepared for mailing to all the licensees (Exs. 385-386, R. 1494-1511; see par. 12 of Ex. 352, R. 1389, 1491). Brown, Line's patent attorney, directed that the schedule of prices covering non-dropouts (*i. e.*, cutouts covered only by the Kyle patent) should be included in the letter to General Electric, but detached from the other papers, and "without comment" (Ex. 369, R. 1264)." General Electric immediately replied that the schedules as forwarded included one for cutouts involving only the Kyle patent, which "should not have been included" (Ex. 367, R. 1512). Brown then

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"The instruction reads (R. 1264):

Please note with reference to General Electric. Do not attach the schedule of prices of non-dropouts to these letters, one of which goes to Wagner, one to Maynard, and one to Rohde. *In the envelope to Wagner, put the non-dropout schedule therein separately and without comment.* [Emphasis in original.]

Compare Brown's "explanation" at R. 180-181.

apologized, and said (Ex. 389, R. 1514), "The party who put the inclosures in this letter had instructions not to include this schedule and the fact that it was included was not noticed by me."

Whether General Electric would go along on the price increases of Kyle-patent items, as it had been successfully invited to do, was a subject which was causing the other appellees considerable embarrassment. Porcelain wrote to Line that it had learned that General Electric proposed not to increase prices on its non-dropout, porcelain-housed cutouts (Ex. 390, R. 1515). Porcelain viewed the situation as "extremely disturbing" in view of "the position in which all of us are going to be placed." Several other licensees complained about General Electric's failure to raise prices (Ex. 391, R. 1516, 1517), and Porcelain wrote again to express the hope "that you have been able to work out something to offset this situation" (Ex. 392, R. 1518).[fn] After discussing the matter with other licensees, Line determined to allow a month's trial period at the increased prices at the end of which time the situation would be reviewed (Ex. 391, R. 1516, 1517; Ex. 393, R. 1519). The difficulties confronting the group were obviated by the intervening action of the Office of

[fn] With respect to previous rumors that General Electric had been cutting prices on cutouts covered only by the Kyle patent, Line's attorney had suggested in an interoffice memorandum to Kline that, if General Electric were actually cutting prices, "then the preferable way to handle this matter would be by personal contact" (Ex. 481, R. 1661; cf. R. 193).

Price Administration returning prices generally to the levels prevailing on October 1, 1941 (Ex. 394, R. 1520; see par. 13 of Ex. 352, R. 1399, 1401). Line's request to OPA to retain the prices established on December 1 was rejected by that agency (Ex. 395, R. 1521).

(vii) If patent protection rather than price control had been the primary interest of the licensees, then it is difficult to see, particularly as some of them were found by the district court to be "opposed to price control" (*supra*, pp. 4, 22), why they did not join in that prayer of the bill (par. D, R. 17) which asked that the price-fixing terms of the licenses be enjoined. Instead, with striking unanimity, they all asked that the bill of complaint be dismissed in its entirety," and in this Court all appear jointly with the licensor urging that the decree of dismissal be affirmed. We submit that by taking this position the several licensees have neglected a fruitful opportunity to register effective and genuine opposition to price control.

Additional Finding 13A (R. 530), stating appellees' intention to continue to agree upon and to adhere to fixed prices, should have been made.

" Southern (R. 28); Schweitzer and Conrad (R. 35); Railway (general denial, par. 35, R. 40); Westinghouse (R. 45); General Electric (R. 51); Royal (R. 52); Johnson (R. 53); Porcelain (R. 56); Matthews (R. 61); Kearney (R. 65); Pacific (R. 66).

C. LINE THIRD-PARTIES ON ITEMS WHICH IT DID NOT MANUFACTURE OR OFFER FOR SALE

As we have pointed out above at some length, pp. 9–13, Line was substituted for Southern as licensor because it "made a complete line of cutouts and covered the field much more completely and would be able to keep a much better control over the general price situation than Southern States" (Ex. 42, R. 703).

Once the license agreements became effective, in the summer of 1940, Line proceeded to fix prices on all dropout fuse cutouts, irrespective of whether it manufactured the particular cutout in question; and Line's intention to fix prices on this basis was clear from the start. On August 28, 1940, Line sent copies of its existing price schedule to the then five licensees, and to Westinghouse and Porcelain as well, requesting each company to list its products "directly equivalent to those" made by Line, and also its products not covered by Line's schedule but coming within the scope of the license agreement. Duplicate copies of each company's latest price schedules were also requested. (Exs. 181–187, R. 1053–1057.)

All products made by appellees, the prices of which were fixed under the license agreements, are depicted in Exhibit 400 (facing R. 1766), prepared by appellees, and in each instance the comparable Line product, where one existed, is there indicated. That exhibit contains some 145 items,

covering dropout fuse cutouts and parts, upon which prices are fixed but in respect of which no Line catalogue number appears.

Kline, Line's sales manager, testified after checking up overnight that Line did in fact make 22 of those items and had catalogue numbers for them (R. 251), and that they had first been offered for sale by Line late in 1944 (R. 252–253). But prices had been fixed on such cutouts since January 18, 1941 (Exs. 354-356, R. 1403–1426; see par. 1 of Ex. 352, R. 1399). Exhibit 400 shows that all of these 22 items had been regularly made and offered for sale by Southern, and that some of them were regularly made and offered for sale by Pacific and Kearney.

Three of the remaining 123 items for which Line had no listed catalogue numbers in the price schedules were explained as being "light-weight" cutouts comparable to other "standard cutouts" having catalogue numbers (R. 285–286, 457), though the Exhibit 400 tabulation classifies "light-weight" and "standard" as not being comparable (see also Ex. 356 at R. 1416, item 2b).

The remaining 120 items are not regularly manufactured or offered for sale by Line, although according to Kline Line would make them on request (R. 253–255, 288–289). All of these items are regularly made and sold by Southern, however, and some of them by other appellees as well (Ex. 400).

Obviously, as to the items not manufactured by Line, it was not protecting its rights as patentee; it was protecting only the interests of the group as manufacturers in destroying price competition as to those items. And of course it is unlawful for a patentee to fix prices on articles which it itself does not manufacture. *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458–459; *United States* v. *Vehicular Parking*, 54 F. Supp. 828, 838 (D. Del.).

It follows that, under this heading, the district court's Finding 29 (R. 513) is "clearly erroneous", and that Amended Finding 29 (R. 525) should have been made.

D. THE PROVISIONS IN THE LICENSES CONSTITUTING SELF-IMPOSED RESTRICTIONS ON THE PATENTEE HAVE NOTHING TO DO WITH PROTECTION OF THE PATENT

What is perhaps even more fundamental is that important features of the license agreement and significant transactions by the parties operating thereunder were not "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly" (*United States* v. *General Electric Co.*, 272 U. S. 476, 490), had in fact nothing to do with the patentee's protection, and concerned only the effective enforcement of the price-fixing provisions in the interest of the licensees.

(1) All of the license agreements (other than the General Electric licenses under the Kyle

patent) contained provisions for price maintenance by the patentee." These had been requested in the early stages of the negotiations by a number of prospective licensees." Such provisions, obviously, have nothing to do with the patentee's protection, but they have a great deal to do with the protection of those who are interested in price-fixing and who do not have a patent of their own. If protection of the patent is the only criterion, then such provisions are unintelligible; a patentee need not covenant to protect his patent from himself.

(ii) Most of the licensed agreements also contained provisions permitting the licensees to inspect the patentee's books," and the releases given by Southern contained like provisions allowing

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" *General Electric:* Par. 9 of Ex. 94, R. 819, 822; Art. V (a) of Ex. 206, R. 1240, 1244. *Matthews:* Par. 9 of Ex. 134, R. 902, 904; Par. 9 of Ex. 135, R. 926, 929. *Radiancy:* Par. 9 of Ex. 150, R. 991, 995. *Porcelain:* Ex. 209, R. 1120, not printed, same as Ex. 150. *Pacific:* Ex. 212, R. 1132, not printed, same as Ex. 150. *Schweitzer & Conrad:* Art. V (a) of Ex. 229, R. 1134, 1140. *Westinghouse:* Art. V (a) of Ex. 234, R. 1179, 1185. *Johnson:* Art. V (a) of Ex. 262, R. 1286, 1289. *Royal:* Art. V (a) of Ex. 306, R. 1388, 1396.

" Ex. 13, R. 636; par. 28 of Ex. 42, R. 694, 696; par. 8 of Ex. 80, R. 770, 773; Ex. 82, R. 777, 779.

" Art. IV (d) of Ex. 206, R. 1240, 1244; par. 5 of Ex. 134, R. 902, 904; par. 5 of Ex. 135, R. 926, 929; par. 5 of Ex. 142, R. 948, 951; par. 5 of Ex. 150, R. 991, 995; Exs. 209, 212, R. 1120, 1132, unprinted, same as Ex. 150; Art. IV (d) of Ex. 229, R. 1134, 1139; Art. IV (d) of Ex. 234, R. 1179, 1184.

the several licensees to inspect Southern's books."* Here again it can not be contended that the patentee needs protection from himself; it would be a curious answer to the classic query, *Quis custodiet ipsos custodes*—who shall guard the guardians themselves?—to say that the patentee must agree in writing to permit outside inspection of his books in order to secure pecuniary reward from his own patent.

(iii) The record discloses complaints by licensees of alleged price violations by the patentee (Ex. 431, R. 1604; Ex. 439, R. 1613; Ex. 475, R. 1654, 1656). If the complaints were well founded, then the patentee's action derogated, not from the protection available to its own patents, but from the licensees' "advantages" (Ex. 179, R. 1050) under the licenses, viz., price stabilization in the industry.

(iv) We listed at length under Point VI, *supra*, pp. 93–96, the operation of the process of policing of the price provisions. Where these complaints involved a licensee underselling the patentee, then the situation falls within Chief Justice Taft's remark in the *General Electric* case (272 U. S. at 490),

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* Ex. 968, R. 1962, 1963; Ex. 136, R. 948; Ex. 144, R. 965, unprinted, same as Ex. 136; Ex. 151, R. 1001, unprinted, same as Ex. 136; Ex. 210, R. 1190, unprinted, same as Ex. 136; Ex. 213, R. 1122, unprinted, same as Ex. 136; Ex. 231, R. 1175, 1176; Ex. 235, R. 1210, 1211.

> It would seem entirely reasonable that he [the patentee] should say to the licensee, "Yes, you may make and sell articles under my patent, but not so as to destroy the profit that I wish to obtain by making them and selling them myself."

But where the patentee polices a complaint made by one licensee against another licensee of a low price not involving any underselling of the patentee, the patentee's profit is not even affected.[*] It is simply an effort to protect the complaining licensee's business, as one of the most persistent complainers admitted (R. 389). Consequently the policing transaction secures, not protection of the patent or maintenance of its integrity, but only compliance with a price-fixing agreement.

(v) Line's view of the nature of the price-fixing provisions in the licenses is clearly shown in the threats it made when intentional violations of the price provisions appeared imminent.

In March 1943, Line wrote Pacific (Ex. 418, R. 1590) of "irregular price quotations by representatives of various licensees" under the cutout license agreement, saying (R. 1590):

> We have requested all licensees to review the prices, terms and conditions of sale under the License Agreement and to request of their representatives that such

[*] E. g., Matthews' complaint that Kearney was absorbing the Missouri sales tax (Exs. 435-437, R. 1609-1611); both licensees had their place of business in St. Louis, Mo.

prices, terms and conditions of sale be followed with[out I] exception.

We are hopeful that appropriate action will be taken, otherwise it may be necessary for us to modify the prices, terms and conditions of sale as now set up.

In the following month a stronger general letter was sent to all nine licensees (Ex. 419, R. 1591):[a]

> We are informed that certain licensees under the patent to Schultz No. 2,176,227, issued October 17, 1939, for Combined Switch and Fuse, and exclusively owned by the Line Material Company, are proposing to enter bids on a certain project, offering to sell to unlicensed purchasers products manufactured under said patent at prices less than the minimum established and followed by Line Material Company in its sales of similar products under said patent.
>
> In the event you are contemplating an evasion of the provisions of your license, we advise you that any sale of products licensed under said patent at less than the prices established and followed by Line Material Company in its sales of similar products under said patents, will be considered as a breach of the covenants of the agreement by which you are licensed under said patent and as sufficient cause for canceling your license and the agreement.

[a] Johnson and Royal had not then taken licenses.

When Pacific after receipt of this letter made inquiry, Line replied (Ex. 422, R. 1595) that Pacific was not involved—"We trust we have not caused you unnecessary worry"—and explained,

> We had been advised that at least one of our licensees was about to violate terms of their agreement. As a matter of fact, we subsequently learned that that licensee did enter a bid in violation of their agreement and, upon receipt of our notice, withdrew their bid.
>
> We felt that under the circumstances we should place all licensees on notice in order to make our position clear.

In other words, Line threatened to enforce compliance by changing the conditions of sale (Ex. 418) and by considering sales at cut prices "as a breach of the covenants of the agreements by which you are licensed" and as sufficient cause for cancellation (Ex. 419), and Line in fact enforced compliance by inducing the offending licensee to withdraw its low bid (Ex. 423). So far as this record shows, Line never threatened or brought a suit for infringement in consequence of a price violation."

"Line's 1944 suit against Schweitzer & Conrad was not based on a price violation, but on an assertion of infringement in respect of a device which, according to Schweitzer & Conrad, was not within the patents covered by the license and on which therefore no royalties were due. See R. 195, 436-437; Exs. S & C-22 and S & C-23, R. 2061-2062.

It is accordingly interesting to observe how Line's position has changed. Appellees now say (Line Br. 73):

> " " " A license containing a price limitation is merely an assurance that the patentee will not enforce his legal right to sue the licensee for infringement when sales are made at licensed prices and a reservation of that existing right with respect to sales at lower prices.

Line's correspondence would seem to indicate an unawareness of any such right.

Appellees continue (Line Br. 79):

> The price provisions of the licenses in this case are not contractual obligations in the sense that if a licensee sold the licensed devices below the minimum prices there would be a breach of contract. The price provisions are merely limitations of the grant. This is not a mere matter of semantics, but a matter of substance, affecting the remedies available to the licensor on breach of the condition.

We content ourselves with pointing to Exhibit 419, quoted *supra*, p. 133, and with remarking that Line's view *ante litem motam*, there expressed not by a lay businessman but by its lawyer who had drafted all the licenses now under scrutiny, was precisely the reverse of what it now advances.

The first price schedule agreed upon by the major appellees, and which became effective on January 18, 1941, resulted in price increases for the great majority of items which were effected. Exhibit 400 (facing R. 1756), prepared by the appellees at the request of the Government, shows in parallel columns the net prices of dropout fuse cutouts and their parts as suggested in the price schedule of January 5, 1940, first circulated by Line, and as agreed on by the major appellees in the price schedule effective January 18, 1941. Inspection discloses that, by such agreement, net prices were increased in 60 instances, unchanged in 17 instances, and lowered in only 2. The remaining items listed in Exhibit 400 had not been priced by Line in its 1940 schedule.

On March 7, 1941, the net price of the light duty open type cutout was increased from $6.60 to $8.36 (Exs. 358-359, R. 1434-1436; par. 5 of Ex. 352, R. 1399).[7] The result was that the manufacture of this popular cutout, based on a Rural Electrification Administration design, was probably discontinued (R. 282-283, 290, 264-265).

Effective June 2, 1941, net prices were increased 5% on all open and enclosed dropout fuse

[7] Line's letter (Ex. 358) states that the price is being increased from $15.00 to $19.00, while Matthews' memorandum speaks of a change from $6.60 to $8.36. The explanation of this apparent inconsistency is that $15 list is $6.60 net, and $19 list is $8.36 net; the discount factor is 56% on large quantities. See Ex. 355, R. 1404.

cutouts and parts except for one kind of open type cutout (Exs. 369–370, R. 1448–1451; Exs. 378–380, R. 1462–1489; pars. 8 and 10 of Ex. 352, R. 1399, 1400).

Another price increase, which applied to all dropout fuse cutouts and parts, was to go into effect on December 1, 1941 (Ex. 385–386, R. 1494–1511; par. 12 of Ex. 352, R. 1399, 1401). However, the Office of Price Administration forced an abandonment of this increase (Exs. 394–395, R. 1520–1521; par. 13 of Ex. 352, R. 1399, 1401; see R. 246), and prices were reduced to the June 2, 1941, level (Exs. 396–398, R. 1522–1546; par. 14 of Ex. 352, R. 1399, 1401). That level remained in effect at the time of the trial in September 1945 (Ex. 400, facing R. 1766; R. 216), and presumably continued as long as statutory price stabilization was in force (cf. R. 315).

As early as October 1938 Crump of Kearney had noted that one reason for Kearney's signing the Southern license had been "to stabilize or even increase resale prices" (Ex. 22, R. 663; *supra*, pp. 46–47). On this point his subsequent testimony consisted of a frank elaboration of his earlier position (R. 417):

> Q. Now, you say that the second reason that prompted you to enter into this contract was to allow the holders of the patents to stabilize the industry's prices. What did you mean by that, Mr. Crump?
>
> A. I meant by that in view of the fact

that we were infringing the patent and would be forced to take a license out under the patent or discontinue the sale of that type of cutout, and as long as the price agreement was—the price control was a part of that patent which we were—had very little choice as to whether we signed or didn't sign—that as long as they had the right to establish prices on a device on which they held patents; that I felt that they would adjust the prices in such a way that some of the various articles on which the margin of profit was very low would possibly be raised to the point where it would be profitable to sell that item and possibly on some of the other items that other adjustments would be made possibly in the other direction, but that at least I felt that their cost of manufacture was comparable with our cost of manufacture, and that the prices would be more in line with the cost of production.

And Carlisle of Railway had written Line and Matthews in April 1940 (Exs. 119–120, R. 381–382), saying he felt that an upward revision of prices was in order (cf. R. 212, 482).

The actual effects of the present price-fixing combination could hardly in consequence have come as a surprise to any of the licensees.

It follows that Additional Finding 12A (R. 530), setting forth the fact of sales at fixed prices and the result of increased prices, should have been made.

It follows from what has been set forth under the present point that so much of the district court's Finding 32 (R. 514) as states that—

> The price limitation provisions contained in the various license agreements here in evidence were insisted upon by the patent owner and were intended and reasonably adapted to protect its own business and secure pecuniary reward for the patentee's monopoly—

is, as the Government urged below (R. 526, 534), without support in the evidence. It is "clearly erroneous."

IX. THE SEVERAL LICENSE AGREEMENTS CONTAINING UNIFORM PRICE LIMITATION PROVISIONS WERE A PRODUCT OF JOINT, RECIPROCAL, AND CONCERTED ACTION AMONG THE PROSPECTIVE LICENSEES, PROMPTED AND PARTICIPATED IN BY THE PATENTEES

It is of course apparent from the foregoing points that concerted action was the keynote in all the steps that led to the formulation, consummation, and eventual operation of the price-fixing combination to which appellees were parties. The manufacturers in the dropout fuse industry were not rugged individualists who conducted business on the principle of walking alone. Further analysis of the evidence confirms the conclusion that, from the very inception of the plan, its progenitors never lost sight of their intended end-result, viz., an industry tied down to a single price schedule.

The action of every manufacturer was largely based on what the others did, and when all met together it was to clarify new points which had arisen, and, thereafter, to reach agreement upon them. We have pointed out above, as we pointed out at the original argument (U. S. Br. 69–73), how the course of the negotiations, from 1938 until 1941, was marked by a long series of meetings, at each of which the major portion of the dropout fuse industry was represented. There was such a meeting in October 1938, shortly after Kearney signed its 1938 license.[n] There were

[n] Ex. 22, R. 663; Ex. 26, R. 673.

such meetings in June,[72] August,[73] and October 1939,[74] in connection with the discussions and negotiations that preceded the signing of the license agreements. Nothing, we submit, more clearly discloses the underlying understanding that joint action was contemplated than General Electric's call for the August 1939 meeting (Ex. 52, R. 709)—"We expect to have something concrete to suggest which will expedite discussion and, I hope, avoid the necessity of more meetings on this subject." And similar industry-wide meetings called to implement the price-fixing combination were held in September 1940[75] and again in January 1941.[76] Agreements concerning future commitments were made at each of these meetings. Some prospective licensees urged further joint meetings, which did not however materialize (Ex. 117, R. 878; Ex. 121, R. 883).

And, in the interim, pending whichever conference in fact came next, the principal and favorite news item for all the prospective licensees was information as to what other prospective licensees had done or would do. The record is full of such letters.[77] Even General Electric, the

[72] Exs. 49–50, R. 703–706 (June 1); Ex. 51, R. 707 (June 6).
[73] Ex. 58, R. 721.
[74] Ex. 71, R. 744.
[75] See Fdg. 28, R. 512, and pp. 81–84, *supra*.
[76] See Fdg. 28 at R. 513, and pp. 84–85, *supra*.
[77] E. g., Ex. 81, R. 776; Ex. 103, R. 865; Exs. 107–108, R. 868–869; Exs. 116–117, R. 877–879; Ex. 119, R. 881; Ex. 121, R. 883; Ex. 123, R. 890; Ex. 126, R. 895; Exs. 129–131, R. 896–899; Ex. 178, R. 1049; Ex. 319, R. 1346; Ex. 340, R. 1379.

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largest manufacturer, expressed a live interest in what its competitors might be up to. In January 1940, while its negotiations with Line were under way, Wagner wrote Bobst (Ex. 90, R. 312), "Before replying to the Line Material Company, I should also like to get a further line on what competitors are doing, which I shall be able to do next week." Accordingly, he suggested that Bobst defer his reply for ten days. And, nine days after General Electric executed its licenses with Line (see R. 828, 851), Wagner was already inquiring of the licensor (Ex. 107, R. 868), "Have any other manufacturers of drop-out cutouts and wet process enclosed cutouts signed similar agreements with you?" General Electric made further inquiries from time to time (Ex. 156, R. 1011; Ex. 246, R. 1220; see Ex. 273, R. 1272), and periodically received reports from Line as to the latter's progress in obtaining additional signatures (Ex. 155, R. 1010; Ex. 160, R. 1018; Ex. 242, R. 1216; Ex. 247, R. 1221; Ex. 310, R. 1337).

Such inquiries were a preliminary to the almost uniform attitude of the prospective licensees, to the effect that they would go along if the others did, but would not do so if the others did not. This view runs consistently through the negotiations. We have already traced, *supra*, pp. 38–40, Matthews' view that it would go along if General Electric did and that it favored price control if

and only if all manufacturers were similarly bound, a view which found ultimate expression in the escrow arrangement which Matthews traded out with Line (*supra*, pp. 24–35). Kearney had steadfastly expressed a similar attitude, beginning with its repudiation of the 1938 license. See pp. 49–54, 57–60, *supra*. In respect of subsequent negotiations, Kearney had advised five competitors in September 1939 that "our company is willing to go along with the other prospective licensees on an agreement which would be mutually satisfactory to all parties involved," with a proviso that the details must also be satisfactory to Kearney (Ex. 60, R. 726). Railway's position in April 1940 was (Ex. 108, R. 869), "It is our intention to accept agreement 'E' providing the others in the group do go along with the acceptance of the agreement." And again, in the same month (Ex. 120, R. 882), "From our standpoint, we are pretty well satisfied with the agreement as it is written up and we would like to see some final arrangements completed to satisfy all concerned. * * * the general feeling will be to have a meeting at which all interested parties can get together on the final acceptance of these agreements and from our standpoint we are perfectly willing to have such a meeting and get this thing completely cleaned up just as soon as possible." It will be recalled, *supra*, p. 60, that the deposits in escrow of the executed Matthews,

Kearney, and Railway licenses made all of them effective.

The smaller competitors were similarly motivated. Pacific wrote Matthews in August 1940 (Ex. 178, R. 1049):

> We have not heard from the principals of this license agreement and I'd appreciate if you would advise us if all the interested parties have signed up with them. If they have, it seems to me that if we want to get in on this agreement I had better write them for a copy of the license agreement and sign it up.

And Porcelain the following month wrote Kyle of Line (Ex. 202, R. 1112), "I want the contract which you send me to be just like the other boys have."

The result of all the foregoing concerted action was that, as originally proposed by Line and Southern, and as insisted on by Kearney and Matthews, all the major competitors were bound simultaneously and the price schedule went into effect at one time.

Neither the 1938 license to Kearney (Ex. 16, R. 643) nor the draft which Southern had circulated to the other manufacturers in the same year (Ex. 18, R. 653) had contained a most favored nation clause. But one appeared in the draft which Bobst of General Electric presented to the August 1939 meeting (par. 15 of Ex. 57, R. 715, 719). This provision, which ultimately

appeared in all of the executed agreements," preserved for the early signatories any more favorable terms that late-comers were able to obtain, and General Electric, which had signed the first Line licenses with this protection included, took advantage of the provision to obtain new agreements in the following year (R. 856; Exs. 266–268, R. 1240–1263; for explanation, see Ex. 254, R. 1224). In view of General Electric's part in the formulation of the most favored nation clause, it will now naturally be difficult for appellees to deny what we have already pointed out above, pp. 15, 18, that the largest manufacturer of all did in fact contemplate an industry-wide combination."

In the end, each company knew precisely what the others were doing. At the time that each of the appellees other than General Electric signed the license agreement offered by Line, it knew

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[11] Par. 17 of Ex. 94, R. 819, 825; par. 12 of Ex. 95, R. 845, 849; par. 17 of Ex. 134, R. 902, 909; par. 16 of Ex. 135, R. 926, 932; par. 17 of Ex. 142, R. 949, 956; par. 17 of Ex. 150, R. 991, 998; Ex. 209, R. 1120, unprinted, same as Ex. 150; Ex. 212, R. 1122, unprinted, same as Ex. 150; art. XI of Ex. 229, R. 1134, 1147; art. XI of Ex. 234, R. 1179, 1191; art. XI of Ex. 266, R. 1240, 1250; art. X of Ex. 267, R. 1253, 1259; art. XI of Ex. 282, R. 1286, 1295; art. XI of Ex. 306, R. 1323, 1332.

[12] A Westinghouse inter-office memorandum indicates that prior to execution of the license agreements Westinghouse required "submission of copies of all license agreements under the Schultz, Lemmon, and Kyle patents, to better enable us to determine whether any of such agreements are more favorable than those submitted to us" (Ex. W-26, R. 2325).

which ones among its competitors had already signed such licenses; it knew that those other licenses were either similar to or identical with the license it was signing; and it knew what other competitors were still negotiating with Line."*

This statement is completely and irrefutably established by the several appellees' answers to interrogatory 7 (Ex. 7, R. 601, 605–609). The district court in consequence clearly erred in refusing to amend Finding 26 (*cf.* R. 512 with R. 524), and in refusing to make Additional Finding 7A (R. 528–529).

With respect to Finding 20 (R. 509), to the effect that each license agreement was "entered into as a result of arm's length negotiation", we adhere to what we said at the first argument (U. S. Br. 71, n. 52), that that finding can be supported only if it means that, within the framework of the major license provisions erected by joint determination, including the provisions for price fixing, individual licensees were free to (and did) bargain and haggle with the patentees in respect of minor modifications. On any other assumption Finding 20 is "clearly erroneous" and unsupported by the record (R. 533). For the evidence indisputably establishes that the joint

* General Electric, the first signer could of course only know of pending negotiations with others (R. 606), but it had already been advised of their joint intention to take licenses (Ex. 50 at R. 706; Ex. 58 at R. 723; Ex. 59, R. 724; Ex. 60, R. 726).

action of the parties paved the way for, and was undertaken in anticipation of, industry-wide acceptance of price-fixing licenses. And the evidence likewise establishes beyond dispute that, in fact, this is what occurred.

X. THE DISTRICT COURT'S FINDINGS ARE "CLEARLY ERRONEOUS" AND IN THE CIRCUMSTANCES ARE NOT ENTITLED TO ANY PARTICULAR WEIGHT

Rule 52 (a), F. R. Civ. P., provides in part that

> Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses.

In the present case, the evidence consists of about 700 exhibits, many of them of considerable bulk, which aggregate nearly 1,800 pages, plus about 400 pages of testimony, much of which was interrupted by the reading of pertinent parts of the exhibits as they were introduced.

Only eleven witnesses testified, all of whom were—or, in Carlisle's case, had been—officers and employees of the appellee companies. Their testimony consisted in very large measure of attempts to explain away letters and memoranda which they had written some years before they appeared as witnesses. Much of their testimony was given in response to pages upon pages of leading questions put by appellees' lawyers, to such an extent that the court was finally moved to say to counsel

(R. 216), "I think a great many of your questions have been objectionable and should have been objected to. You can ask questions without putting words in the witness's mouth."

The record in this case makes apposite Judge Learned Hand's comment in a similar connection, also, as it happened, a proceeding under the Sherman Act. He said (*United States* v. *Corn Products Refining Co.*, 234 Fed. 964, 978 (S. D. N. Y.)):

> * * * Ordinarily the intent, which plays so large a part in the decisions of the court in cases of this sort, must be gathered alone from the conduct of the defendants themselves; but in this case, by an unusual chance, the evidence goes much further. The officers of the Corn Products Refining Company apparently had a custom of communicating with each other by typewritten, unsigned memoranda. Apparently it was often difficult for them to interview each other personally, and the affairs of the company were discussed between them by means of these memoranda with the utmost frankness. The documents were never intended to meet the eyes of any one but the officers themselves, and were, as it were, cinematographic photographs of their purposes at the time when they were written. They have, therefore, the highest validity as evidence of intention, and, although in many instances Bedford attempted to contradict them, his contradiction only served

to affect the general credibility of his testimony. * * *

The testimony in this case amply bears out the observation made, that subsequent attempts to contradict contemporaneous documents but serve to affect a witness's credibility. There is, for instance, the testimony of Brown of *Line* (R. 205–206, 213), that at the time of the escrow Kearney was subject to price control and to a licensee, in the face of the unquestioned fact that Kearney had repudiated its 1938 license and had refused to be bound by it (*supra*, pp. 49–54, 61–62). There is the further testimony of Brown (R. 205) that Line in no way made acceptance of a license under the Lemmon-Schultz patents conditional upon acceptance of a license under the Kyle patent, in the face of at least ten of his own letters specifically to the contrary (Exs. 74–78, R. 750–755; Ex. 93, R. 817; Ex. 100, R. 860; Ex. 180, R. 1051; Exs. 205–206, R. 1115–1118). There is also testimony by Brown, who according to his own letters and memoranda was the Line official who induced Southern to threaten Pacific with a suit for infringement of a Southern patent not included in the license agreements, this in order to protect the price structure under the agreements (Point VI (c), *supra*, pp. 102–106), that (R. 208) Line never attempted to control prices on any device not covered by its own patents.

There is the testimony of Kline of Line that he refrained from attempts to fix resale prices

on the advice of counsel (R. 285), in the face of evidence of another such attempt on his part in the following year (*supra*, pp. 65–67). There is the testimony of Kyle of Line that (R. 311) "we never knew exactly who wanted price control," in the face of Kearney's repudiation of the 1938 license when the inducement of industry-wide price-fixing failed to materialize (*supra*, pp. 49–54), and in the face of Matthews' enthusiastic approval of the "spirit and intent" clause of the price-fixing provision (*supra*, pp. 24–26). There is Carlisle's labored effort on the stand (R. 481–484) to explain away his contemporaneous memorandum of the June 1, 1939, meeting (Ex. 49, R. 703).[a] There is the testimony of Crump of Kearney (R. 423) that Kearney had no collateral understandings, in the face of Kearney's repudiation of its 1938 license on the ground that the inducement of industry-wide price-fixing had failed to materialize, and of Southern's acquiescence in such repudiation (*supra*, pp. 49–54). And there is the

---

[a] Carlisle's memorandum in 1939 (Ex. 49, R. 703):

> The decision was to go ahead and try to get a satisfactory agreement at a reasonable royalty and, possibly, get some price control into it.

Carlisle's explanation in 1945 (R. 482):

> This was simply an informal statement from me to my superior and I intended to convey to him the possibility that although a number of objections had been raised to price control, that it was my belief that there would be price control in the agreement when it was finally offered to us.

testimony of Cooley of Matthews that no other manufacturer had agreed that, if Matthews would take a license, it would also do so—"No, definitely," was his response (R. 379)—in the face of a "Dear Mike" letter he had received from Railway which plainly said (Ex. 108, R. 369), "It is our intention to accept agreement 'E' providing the others in the group do go along with the acceptance of the agreement." Similarly, Cooley twice stated, on direct (R. 380) as well as on cross-examination (R. 405), that the escrow idea originated with Line, in the face of his own letter (Ex. 122, R. 385, par. 4) which plainly showed that this had always been Matthews' idea. Cooley's attempt to explain this contradiction away on a "Matthews proposes, Line disposes" basis (R. 406), scarcely adds to the weight of his testimony.

It is not an inspiring recital, this listing of the fallibilities of recollection. And no reassurances of demeanor, no inner urge to speak truth, can fortify testimony so inherently unreliable. It is one thing to weigh conflicting stories of witnesses who contradict each other, quite another to weigh testimony of witnesses which is self-contradictory, and which seeks to impugn their own correspondence.

This case involves the interpretation of documents and requires the drawing of inferences from documents, a task which an appellate court is at least fully as well equipped to perform as is

a trial court."[*] And here, as the present brief amply demonstrates, the trial court's treatment of the evidence was fallible indeed.

Not only did the district court apparently prefer the obviously inaccurate testimony, just noted, of the witnesses; it refused in numerous instances to credit unimpeached documents. The most striking example of this tendency is its failure to make Amended Finding 7A as to knowledge, a finding that rested entirely on the appellees' answers to interrogatories (*supra*, pp. 145–146). A similar instance is its failure to amend Finding 28 to include matter that is set out plainly in the very letters on which the unamended Finding rested (*supra*, pp. 81, 83). And one of the strangest aspects of the present litigation must remain the district court's failure to accord any weight, as against his client, to Harrington's precise and carefully phrased letters in which Kearney repudiated its obligations under the 1938 license (*supra*, pp. 49–52).

There is no need to recapitulate at this juncture what has already been stressed in detail under every heading throughout the present Supplemental Brief: the vast gap which separates the findings from the record. We content our-

[*] See, e. g., *Kuhn* v. *Princess Lida of Thurn and Taxis*, 119 F. 2d 704, 705–706 (C. C. A. 3); *State Farm Mut. Auto Ins. Co.* v. *Bonacci*, 111 F. 2d 412, 414–415 (C. C. A. 8); *Stewart* v. *Ganey*, 116 F. 2d 1010, 1012–1013 (C. C. A. 5); *Carter Oil Co.* v. *McQuigg*, 112 F. 2d 275, 279 (C. C. A. 7); *Equitable Life Assn. Soc.* v. *Irelan*, 123 F. 2d 462, 464 (C. C. A. 9).

selves simply with summarizing what we have already abundantly documented, viz., that the findings on almost all of the vital points in dispute between the parties are "clearly erroneous" (Rule 52 (a), F. R. Civ. P.), and that in the circumstances of this case, having due regard to the nature of the evidence, they are not entitled to the weight which ordinarily does—and should—attach to findings of fact.

XI. IT FOLLOWS THAT THE PRESENT PRICE-FIXING COMBINATION IS NOT WITHIN THE PROTECTION OF THE *GENERAL ELECTRIC* CASE; OR, IF IT IS, THE CIRCUMSTANCES HERETOFORE DISCUSSED CONSTITUTE AN ADDITIONAL GROUND FOR OVERRULING THAT DECISION

The present price-fixing combination is not protected by the doctrine of *United States* v. *General Electric Co.*, 272 U. S. 476, primarily because it is the kind of concerted action to restrain trade through price-fixing which is, and always has been held to be, illegal.

As to the original members of the combination, who in concert shaped the basic understandings and agreements which ultimately came to fruition, the price-fixing scheme falls within the condemnation of *United States* v. *Masonite Corp.*, 316 U. S. 265. As to the late-comers, who gave their adherence to the scheme knowing that concerted action was either invited or contemplated or already under way, it is squarely within the ban of *Interstate Circuit, Inc.* v. *United States*, 306 U. S. 208. The intention to fix prices, which appears throughout, proscribes the combination

under the rule of *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, even if it be assumed *arguendo*, contrary to our interpretation of the evidence, that the price-fixing motivation was simply present and not dominant. The united exercise of the monopoly granted by the Kyle porcelain box patent with the monopolies granted by the Lemmon-Schultz dropout fuse patents in order to restrain competition under the latter is clearly illegal under *Standard Oil Co.* v. *United States*, 283 U. S. 163. And Line's fixing of prices on articles which it did not itself make is branded as unlawful in *Ethyl Gasoline Corp.* v. *United States*, 309 U. S. 436, 458–459.

These arguments were set out at detailed length in our original brief (U. S. Br. 68–82), and there is no occasion to repeat or to restate them now. We suggest, however, that the Court may find it convenient to reread U. S. Br. 68–82 in the light of the more complete presentation of the facts as to appellee's activities which has been set out in the present supplemental brief.

Moreover, we submit that the restrictions which the license agreements here involved placed on the licensor, Line, constitute an additional ground for distinguishing the *General Electric* case. As we have shown, pp. 129–132, *supra*, these restrictions have absolutely no relationship to any reasonable protection of the patents involved, or to any maintenance of those patents' integrity. They are nothing more or less than stipulations and under-

takings by parties having complete freedom of action that they will maintain fixed prices and that they will afford their licensees facilities for enforcing such price maintenance. Unless, therefore, the mere possession of a patent carries with it a complete dispensation from compliance with all other regulatory laws, which we do not for a moment believe, see *Pfotzer* v. *Aqua Systems, Inc.*, 162 F. 2d 779 (C. C. A. 2), it follows that the present agreements do not fall within the rationale of the *General Electric* case. They are not means "normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly" (272 U. S. at 490).

It is true that the *General Electric* case involved certain restrictions on the licensor. Article 11 of the license from General Electric to Westinghouse which was there in question provided for mutual inspection of books (R. 120, No. 113, Oct. T. 1926). Article 13 (R. 121) provided that the licensee's prices should be those "fixed * * * and followed by the Licensor," and Article 16 (R. 125) made provisions for damages to be paid the licensee if the licensor were to sell at lower prices than the licensee.

But these points were only casually argued. The Government's brief made only two short references to those provisions (pp. 64, 88). General Electric argued (G. E. Br. 77) that its license was "wholly free from restrictions such as have been held invalid by the courts," *e. g.*, "(*d*) The busi-

ness of the licensor is not restricted." It contended (G. E. Br. 83–84) that the provisions in question simply meant that it must follow its prices unless it changed them, and that (G. E. Br. 84) "the license does not take away the General Company's right to change the prices." Westinghouse disposed of the matter in a single short paragraph (West. Br. 37), saying, *inter alia*, "All that [the licensor] obligates itself to do is to notify the licensee of such proposed changes within the times specified in the contract before they become effective. Clearly there is no unreasonable restraint here. Good faith and fair dealing would require the observance of such practice without contract."

The opinion of the Court on the license point (272 U. S. at 488–494) neither states the fact that the license contained restrictions on the licensor nor does it discuss the significance or effect of those restrictions. While, therefore, the question of restrictive stipulations binding the patentee may not strictly have "lurked" in the record in the sense that the point was passed over in complete silence (cf. *Webster* v. *Fall*, 266 U. S. 507, 511; *United States* v. *Mitchell*, 271 U. S. 9, 14; *KVOS, Inc.* v. *Associated Press*, 299 U. S. 269, 279), obviously the *General Electric* case cannot be considered a genuine precedent as to such provisions. Cf. *Ayrshire Corp.* v. *United States*, 331 U. S. 132, 137, n. 2. The rule of *Bingham* v. *United States*, 296 U. S. 211, to the effect that matters pertinent

to an issue before the court and which were presented to it are to be taken as covered by the decision though not mentioned in the opinion, is not applicable here, since the very presence of restrictions on the patentee is inconsistent with the rationale of the *General Electric* opinion.

Such restrictions, for reasons which we have already canvassed, *supra*, pp. 129–132, add nothing to the patentee's protection. They are not a mode of maintaining the integrity of a patent, they are only means normally and reasonably adapted to securing the effectiveness of a price-fixing agreement. In restricting himself, in agreeing to follow his own set prices, in covenanting with others that he will permit them to inspect his books and records, the patentee is not exercising any rights which he has been granted under the patent law. On the contrary, he is giving up rights which were his under general law. As Judge Learned Hand said but recently in *Pfotzer* v. *Aqua Systems, supra,* 162 F. 2d at 784, "Its possession of the patents did not give the Aqua Company any immunity from § 1 of the Sherman Act, for it restricted its freedom to make and sell the patented articles and that freedom it derived from the common law, not from the patent law." Consequently, if the reasoning of the *General Electric* case is held still to have validity today, then it condemns the arrangements, the practices and the self-imposed restrictions resting on the patentees which are reflected by the present record.

On its facts, apart from the foregoing, the *General Electric* case is clearly distinguishable on a number of grounds. That case did not involve the concerted action of many licensees; it did not involve adherence by third parties to a price-fixing scheme already in existence; it did not involve policing of price violations in the interest of licensees; it did not involve attempts to fix resale prices or to use one patent to fix prices under a license covering other patents; it did not involve the fixing of prices on articles not manufactured by the patentee; and it did not involve joining the monopoly of one patent (here Kyle) to the monopoly of other patents (here Schultz and Lemmon) in order to fix prices and hence restrain competition under the latter patents.

If, however, the holding and language of the *General Electric* case, pushed to the furthest extensions which dry logic and argumentative consistency permit (as to which see *United States* v. *United States Gypsum Co.*, No. 13, this Term), can be deemed to legitimize the combination here under scrutiny, then, we submit, those further factors constitute grounds additional to those already canvassed (U. S. Br. 40–68) for overruling *United States* v. *General Electric Co.*, 272 U. S. 476.

CONCLUSION

For the foregoing additional reasons, the judgment of the district court should be reversed, with directions to enter a judgment granting appropriate relief to the United States.

Respectfully submitted.

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ROBERT G. SEAKS,
Special Assistants to the Attorney General.

NOVEMBER 1947.

APPENDIX A

List of Principal Individuals Connected With Appellees

1. *Alphabetically arranged*

Atkinson	Pacific's attorney
Avery	Schweitzer & Conrad's assistant to the president
Beam	Westinghouse's assistant to the vice-president
Bobst	General Electric's patent attorney
Brown, Chester W.	Line's patent attorney
Brown, Jackson, Boettcher & Dienner.	Schweitzer & Conrad's atorneys
Carlisle	Railway's sales manager
Cooley	Matthews' vice-president
Cronheim	Southern's secretary and vice-president
Crump	Kearney's vice-president and chief engineer
Dienner	Schweitzer & Conrad's attorney
Frenger	Westinghouse's switchgear sales manager
Harrington	Kearney's attorney
Haynes	Matthews' patent attorney
Heberlein	Westinghouse's switchgear sales manager
Hendricks, W. A.	Kearney's vice-president in charge of engineering
Hill, Carlton	Lawyer; escrow agent
Hoffman	Kearney's vice-president
Howson & Howson	Southern's patent attorneys
Kearney	Kearney's president
Kerr	Railway's president
Koch	Matthews' secretary
Kline	Line's sales manager
Kyle	Line's president
Lemmon	Southern's president
Livingston	Schweitzer & Conrad's sales manager
Lockwood	Schweitzer & Conrad's attorney
McCauley	Railway's vice-president
Menard	General Electric's switchgear engineer
Mueller	Westinghouse's patent attorney
Owen	Porcelain's president
Pope	Porcelain's assistant sales manager
Potter, Pierce & Scheffler	Railway's attorneys
Sawyer	Matthews' attorney
Schultz, F. E.	Royal's president
Schultz, W. O.	Line's engineer; inventor

1. *Alphabetically arranged*—Continued

Sixtus	Pacific's vice president
Smrz	Line's vice-president
Sonnekalb	Southern's patent attorney
Spector	Royal's attorney
Squier	Westinghouse's sales manager for protective devices
Steinmayer	Line's vice-president and chief engineer
Stratton	Westinghouse's patent attorney
Swanson	Line's eastern plant manager
Swingle	Westinghouse's patent lawyer
Thompson, J. S.	Pacific's president
Thompson, W. E.	Southern's vice-president
Traver	General Electric's switchgear engineer
Tullar	General Electric's vice-president in charge of patents
Wagner	General Electric's sales manager for cutouts
Wilson, J. C.	Schweitzer & Conrad's vice-president
Wise, Corbett & Canfield	Matthews' attorneys

2. *Arranged by Companies*

LINE MATERIAL

Kyle	President
Steinmayer	Vice-president and chief engineer
Smrz	Vice-president
Swanson	Eastern plant manager
Brown, Chester W.	Patent attorney
Kline	Sales manager
Schultz, W. O.	Engineer; inventor
Hill, Carlton	Escrow agent

SOUTHERN

Lemmon	President
Cronheim	Vice-president and secretary
Thompson, W. E.	Vice-president
Howson & Howson	Patent attorneys
Sonnekalb	Patent attorney (of Howson & Howson)

GENERAL ELECTRIC

Tullar	Vice-president in charge of patents
Wagner	Sales manager for cutouts
Bobst	Patent attorney
Traver	Switchgear engineer
Menard	Switchgear engineer

KEARNEY

Kearney, Sr.	President
Crump	Vice-president and chief engineer
Hendricks, W. A.	Vice-president in charge of engineering
Hoffman	Vice-president
Harrington	Attorney

2. *Arranged by Companies*—Continued

MATTHEWS

Cooley	Vice-president
Koch	Secretary
Haynes	Patent attorney
Wise, Corbett & Canfield	Attorneys
Sawyer	Attorney (of Wise, Corbett & Canfield)

PACIFIC

Thompson, J. S.	President
Sixtus	Vice-president
Atkinson	Attorney

POMEGATE

Owen	President
Pope	Assistant sales manager

RAILWAY

Kerr	President
McCauley	Vice-president
Carlisle	Sales manager
Potter, Pierce & Scheffler	Attorneys

ROYAL

Schultz, F. E.	President
Spector	Attorney

SCHWEITZER & CONRAD

Wilson, J. C.	Vice-president
Avery	Assistant to the vice-president
Livingston	Sales manager
Brown, Jackson, Boettcher & Dienner	Attorneys
Dienner	Attorney (of Brown, Jackson, Boettcher & Dienner)
Lockwood	Attorney (same)

WESTINGHOUSE

Beam	Assistant to the vice-president
Squier	Sales manager for protective devices
Stratton	Patent attorney
Mueller	Patent attorney
Swingle	Patent attorney
Frenger	Switchgear sales manager
Heberlein	Switchgear sales manager

APPENDIX B

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Supreme Court of the United States

OCTOBER TERM, 1946

No. [redacted] 8

UNITED STATES OF AMERICA,

Appellant,

v.

LINE MATERIAL COMPANY *et al.*,

Appellees.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

JOINT BRIEF FOR APPELLEES

April 22, 1947.

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Supreme Court of the United States

OCTOBER TERM, 1946

UNITED STATES OF AMERICA,
Appellant,
v.
LINE MATERIAL COMPANY *et al.*,
Appellees.
No. 464

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

JOINT BRIEF FOR APPELLEES

OPINION BELOW

The opinion of the District Court (R. 485) is reported in 64 F. Supp. 970.

JURISDICTION

This is a suit in equity, brought November 14, 1944, by the United States pursuant to Section 4 of the Sherman Act, for injunctions against appellees in respect of certain agreements and acts alleged to constitute a violation of Section 1 of said Act.[1]

[1]Act of July 2, 1890, c. 647, Secs. 1 and 4, 26 Stat. 209; 15 U. S. C. Secs. 1 and 4. In view of this Court's familiarity with Sections 1 and 4 of the Sherman Act, it seems unnecessary to reprint them.

The final judgment of the District Court dismissing the Government's complaint on the merits was entered on May 14, 1946 (R. 516). A petition for appeal was filed and allowed on July 25, 1946 (R. 538, 542-3). Jurisdiction is conferred on this Court by Section 2 of the Expediting Act[1] and Section 238 of the Judicial Code.[2] Probable jurisdiction was noted on October 21, 1946 (R. 560).

STATEMENT OF THE CASE

The Proceedings Herein

This is an appeal from the judgment of the United States District Court for the Eastern District of Wisconsin dismissing a suit brought against appellees for alleged violation of Section 1 of the Sherman Act. The complaint alleged that appellees were unlawfully combining and conspiring to fix their respective selling prices on dropout fuse cutouts and parts thereof in violation of Section 1 of the Sherman Act (R. 4). All of the appellees filed answers denying the substantive allegations of the complaint (R. 18-67).

Trial consumed six trial days and terminated on September 17, 1945. A large volume of documentary evidence as well as the testimony of eleven witnesses was received. This testimony was concerned not only with a clarification of the documents, but extended to every factual issue in the case. Proposed findings were submitted by the Govern-

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[1]Act of February 11, 1903, as amended, 32 Stat. 823, 36 Stat. 1167; 15 U. S. C. Sec. 29.

[2]36 Stat. 1157, 38 Stat. 804, 43 Stat. 938, 28 U. S. C. Sec. 345.

ment on January 12, 1946, and by appellees on January 19, 1946.

In December, 1945, and January, 1946, all parties filed full briefs on the factual and legal issues presented. The Court filed its opinion on March 6, 1946, subsequent to which appellees filed their requested findings on April 26, 1946, and the Government filed its counter-request on May 4, 1946. The Court entered a judgment dismissing the complaint and filed its Findings of Fact and Conclusions of Law on May 14, 1946 (R. 500-15). On May 18, 1946, the Government filed a motion to amend the Findings of Fact and for additional findings of fact and conclusions of law and amendment of the judgment in accordance with the proposed amended findings and additional findings of fact and conclusions of law (R. 517-34). This motion was, after full oral argument held on May 27, 1946, denied on May 29, 1946 (R. 537-8).

The Patented Devices Involved in This Suit

This suit is concerned with patented electrical devices known as dropout fuse cutouts manufactured within the product claims of United States patents, the validity of which is by stipulation (Ex. L-22, R. 71) not challenged.

Cutouts are protective devices used to break the electric circuit, in which they are installed, when the current becomes excessive because of a short circuit or other overload. Where high voltages are involved, such as on distribution and power lines, two types of fuse cutouts are commonly used, known as dropout and non-dropout fuse cutouts, each of which may be either of the open type, or of the enclosed type, *i.e.*, enclosed in an insulating housing, such as a porce-

lain box. Either type of cutout comprises two insulated terminals connected by a meltable and replaceable wire or fuse link enclosed in an insulating tube called an expulsion tube. Short circuit or overload causes the fuse link to melt or rupture. In a non-dropout cutout, the tube stays in position and must be removed by hand when this occurs. In the dropout type, the tube automatically drops or swings out of place, leaving a large air gap between the terminals (FF 3, R. 501).

The advantages of the dropout over the non-dropout cutout are that the former eliminates the possibility of current leakage along the tube, with its attendant danger of burning of the tube; gives easy visual indication which enables linemen readily to see from the ground that the fuse, often located on the top of an electric distribution pole, has blown; and permits use of a universal type of fuse link (Ex. 4, R. 586; R. 122, 461-3).[1]

It is only with respect to cutouts of the dropout type that unlawful price fixing is claimed (Complaint, par. 10, R. 6-7; Ex. L-21, R. 1835).

The Appellees

The appellees in this case, defendants below, consist of eleven corporations and one individual, as follows:

Line Material Company (hereinafter called "Line"),

Southern States Equipment Corporation (hereinafter called "Southern"),

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[1]A table showing the record page where each of the exhibits cited herein was offered in evidence is set forth in the Appendix hereto, pages 102-4.

General Electric Company (hereinafter called "General Electric"),

James R. Kearney Corporation (hereinafter called "Kearney"),

W. N. Matthews Corporation (hereinafter called "Matthews"),

Pacific Electric Manufacturing Company (hereinafter called "Pacific"),

Porcelain Products Company (hereinafter called "Porcelain"),

Railway & Industrial Engineering Company (hereinafter called "Railway"),

Royal Electric Manufacturing Company (hereinafter called "Royal"),

Schweitzer & Conrad, Inc. (hereinafter called "Schweitzer & Conrad"),

Westinghouse Electric & Manufacturing Company (hereinafter called "Westinghouse"), and

T. F. Johnson (hereinafter called "Johnson").

Appellees are manufacturers of electrical devices of various kinds, and each of them manufactures and sells various types of cutouts, including the patented dropout fuse cutouts involved in this suit. As a result, a portion of the cutouts manufactured and sold by appellees General Electric, Kearney, Westinghouse, Schweitzer & Conrad, Railway, Matthews, Porcelain, Royal, Pacific and Johnson are manufactured and sold under licenses under the patents of appellees Line and Southern, which also manufacture dropout fuse cutouts under such patents.

Dropout fuse cutouts are sold primarily to utilities and other industrial users concerned with the distribution of electrical power. The business in devices involved in this suit is relatively small. The average aggregate annual sales of licensed dropout fuse cutouts manufactured by all the appellees from 1940 to 1944 was $1,918,247.78, distributed among appellees as follows (FF 5, R. 502):

General Electric	29.2%
Line	25.4%
Kearney	18.9%
Southern	7.9%
Westinghouse	5.3%
Schweitzer & Conrad	5.1%
Railway	3.8%
Matthews	2. %
Porcelain	1.5%
Royal	0.5%
Pacific	0.2%
Johnson	0.2%

Line and Southern, the owners of the controlling patents, account for an aggregate of only 33.3% of these sales, neither being the largest seller and both being relatively small concerns compared with such licensees as General Electric and Westinghouse.

The dropout fuse cutouts manufactured by appellees under such patents have been and are in open competition with many other cutouts, also manufactured by appellees and others, which perform the same functions but which are not manufactured under such patents or patent licenses, such as open single hinge dropout fuse cutouts, open non-dropout fuse cutouts, non-dropout fuse cutouts enclosed in materials other than cast wet-process porcelain,

automatic circuit breaker cutouts, dropout boric acid fuses and others. Appellees' sales of licensed dropout fuse cutouts represented only 40.77% of the average aggregate annual sales of all licensed and competitive cutouts manufactured and sold by all the appellees (FF 5, R. 502; Ex. L-23, R. 1838).

The Principal Patents Involved in This Suit

The Government has stipulated that it does not contest the validity of the patents involved in this suit, and that, therefore, their validity is not in issue.[1] This stipulation embraces all the patents under which licenses were issued—Schultz, Lemmon and Kyle. These are all product patents.

There are two principal patents involved: the Schultz patent[2], covering an invention made by Line's Vice-President jointly with an employee, and the Lemmon patent[3], covering an invention made by Southern's President.

The Schultz and Lemmon patents disclose devices which are not commercially competitive. The Lemmon patent, while disclosing the basic invention and containing claims covering the dropout fuse cutouts involved in this suit, does not disclose a commercially acceptable device. The Schultz improvement is much simpler in design and can be manufactured at considerably less than the cost of

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[1]Ex. L-22, R. 71; FF 9, R. 503. In its brief, the Government seeks by innuendo to create the impression that the patents involved in this suit are weak and vulnerable. This is wholly improper in view of the stipulation, which eliminated from the litigation the taking of any evidence as to the validity and strength of the patents.

[2]Exs. 3-4, R. 571-92.

[3]Ex. 2, R. 563-70.

the complicated Lemmon device. It is the Schultz improved device which has met widespread commercial demand and use (FF 7, R. 503; FF 10, R. 504).

No one can legally make the commercially accepted Schultz dropout fuse cutout without obtaining a license under both the Schultz and Lemmon patents (FF 10, R. 504). The patents are complementary. The Lemmon patent, as stipulated by the Government (Ex. L-22, R. 71), dominates the Schultz patent; that is to say, the claims of Lemmon read on Schultz.

Southern is the owner of the Lemmon patent. The Lemmon device consists essentially of an expulsion tube supported by a double-jointed hinge at its lower end. As the tube moves into closed circuit position, the hinge is locked and a latch engages a terminal on top of the tube to hold the tube in place. The hinge is released by a relatively complicated solenoid or magnetically operated mechanism when the current becomes excessive because of a short circuit or overload. Thereupon, the circuit is broken in the tube and the tube drops downward, disengaging from the latch, which permits the tube to drop down and swing out. By reason of claims covering the double-jointed hinge construction in cutouts, this patent covers all dropout fuse cutouts involved in this suit (FF 6, R. 502; Ex. 2, R. 563-70).

The Schultz patent, owned by Line, covers a dropout fuse cutout which is an improvement on the device disclosed in the Lemmon patent, and is dominated by the claims of the Lemmon patent. In the Schultz construction, the expulsion tube is supported by a double-jointed hinge which is held rigid by a fuse link. On overload the fuse melts, breaking the circuit in the tube and at the same time

automatically releasing the tube which drops down and then swings outwardly and down (FF 7, R. 503; Exs. 3-4, R. 571-92).

Line also owns a number of patents on enclosed dropout fuse cutouts, among which is the Kyle Patent, covering a device which was invented by Line's President.[1] Four of its claims cover any fuse cutout, whether dropout or nondropout, in combination with a box made of cast wet-process porcelain (FF 8, R. 503; Ex. 5, R. 593-9).

Cutouts with a wet-process porcelain box have great dielectric strength, permit of cheaper construction in smaller units than previously known housings, and have met with widespread commercial success (FF 8, R. 503). If either the Lemmon or the Schultz device is enclosed in a wet-process porcelain box, the Kyle patent is infringed (FF 10, R. 504). This is conceded by the Government to be the only circumstance which brings the Kyle patent into this suit (Exs. L-20-21, R. 1834-5).

The Line-Southern Cross-License Agreements of 1938 and 1940

Long prior to 1938 when Line and Southern cross-licensed each other, Southern had popularized the single hinge dropout cutout (Op., R. 488).

In the single hinge dropout the tubes, because of mechanical failures caused by ice and snow and by wearing from continual use, often failed to drop out, resulting in power failure (R. 122).

The double-hinge dropout, made under both the Lemmon and Schultz patents, is not subject to the same imper-

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[1]Ex. 5, R. 593-9. This patent expires on November 18, this year.

fections (R. 122), and accordingly it received widespread commercial acceptance.

Although Southern's patent covered the double-hinge dropout and was necessary to its lawful manufacture, it was not Southern's form of the device which achieved commercial success, but the Line type of double-hinge fuse dropout specifically covered by the Schultz patent (Ex. 7, R. 601-5). The cost of the latter, because of its greater simplicity of design and construction, is only approximately a fourth of the cost of the former (FF 7, R. 503; R. 123). In fact, Southern's form of the device has never been manufactured commercially, since it cannot be sold in competition with the Line fusible unit (R. 123). The dropout cutouts sold by both Southern and Line as well as by various of the other appellees, as will appear later, followed the Line device but were covered by the claims of Southern's Lemmon patent as well as by the claims of Line's Schultz patent (FF 7, R. 503; Ex. 7, R. 601-5).

Both the Line and Southern devices were the subjects of co-pending patent applications. In 1934, an interference was declared by the Patent Office between the patent application filed by Southern which eventually resulted in the Lemmon patent, and the application filed by Line which eventually resulted in the Schultz patent (FF 11, R. 504).

After protracted adversary interference proceedings in the Patent Office, final Patent Office action was taken in December, 1937, pursuant to which Lemmon was awarded the dominant claims for the double-jointed hinge in a dropout cutout, and Schultz was awarded subservient claims for a double-jointed hinge in a dropout cutout embodying a tube supported by a fusible element (FF 11, R. 504; Exs. 2-4, R. 563-92). The Patent Office thus held that the de-

vices disclosed by Lemmon and by Schultz were both covered by the claims defining the common patentable subject-matter forming the basis of the interference.[1]

It was apparent that when the patents issued containing claims in accordance with the claims allowed by the Patent Office, Line would be infringing the Lemmon patent in the manufacture of practically all its dropout fuse cutouts and would therefore be unable lawfully to continue to make the commercially acceptable device disclosed by its own Schultz application without obtaining a license from Southern. On the other hand, although Southern's Lemmon patent would dominate the Schultz improvement, Southern itself would not be able lawfully to make and sell the commercially acceptable device using a fuse link instead of a solenoid without a license from Line under Schultz. Nor, of course, would anybody else be able lawfully to continue to make the Line device without a license from both Line and Southern. Moreover, if the Line device were enclosed in a wet-process porcelain box, a license would also be required from Line under its Kyle patent, which had already issued (FF 10, R. 503-4).

Faced with this impasse, Line commenced negotiations with Southern for a cross-licensing agreement. After arms-length bargaining, the parties executed a written cross-license agreement on May 23, 1938 (Ex. 12, R. 623), not for the purpose of price fixing, as the Government

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[1]The law is well settled that where two patents are issued, one covering an improvement on the device disclosed by the other, both patents may be valid and neither of the patentees can lawfully use the improved device without a license from the other. *Cantrell* v. *Wallick*, 117 U. S. 689 (1886); *Temco Electric Motor Company* v. *Apco Manufacturing Company*, 275 U. S. 319 (1928).

charges, but, as the District Court found, for the purposes of settling pending litigation (which Line had brought to test the award to Southern), of permitting each of the parties to make the commercially acceptable cutout device, and of facilitating the granting of licenses for such device to secure royalty income therefrom (FF 11, R. 504).

In order to facilitate and simplify licensing these patents to other manufacturers who were and had for some time been manufacturing and selling devices within the allowed claims of the patents, Line and Southern agreed that one of them should have power to sublicense the other's dropout patents (FF 13, R. 505). Under the 1938 cross-license, Southern was to be the licensor because of its previous licensing activities (FF 11, R. 504; R. 125; Ex. S-1-2, R. 1774-6). However, for several reasons, a principal one being that Southern was unable to provide complete patent clearance to manufacturers of enclosed cutouts, infringing appellees to whom Southern offered licenses under the 1938 agreement objected to dealing with Southern as licensor. Accordingly, the 1938 cross-license agreement was superseded by a cross-license agreement in which the positions of Line and Southern were in effect transposed, and Line was granted a license and the right to sublicense under Southern's Lemmon patent, but only for cutouts in which "the circuit interruption is caused by the thermally initiated rupturing of a current carrying element in an expulsion tube" (*i.e.*, the improved device covered by Line's Schultz patent). Line licensed Southern under the Schultz patent, but without the right to sublicense. This agreement was formalized by contract executed January 12, 1940 (FF 18, R. 508-9; Ex. 86, R. 786-96).

Both of the cross-license agreements contained price limitations. Thus, in the 1940 agreement Line's license to

Southern was subject to the condition that Southern's prices for electric fuse equipment sold under the license and covered by Line's patents, be sold on terms not more favorable than those followed by Line in making its own sales under those patents (FF 18, R. 508; Ex. 86, R. 794). Such cross-license did not restrict Line's freedom to grant licenses under its own patents or Southern's patents on any terms it might deem advisable, whether with or without price limitation.

Southern, in the period preceding the cross-license agreement, had been offering licenses under another dropout patent and from the beginning had insisted that any license must be limited to devices sold at prices not lower than those at which Southern offered and sold the same (FF 13, R. 505). Line had numerous patents in the cutout field, and it also had insisted on a price limitation in any license granted under its important patents (FF 13, R. 505). Thus, both Line and Southern had previously independently established policies of insisting upon price limitation whenever they granted licenses under important patents (FF 12, R. 504), and these policies were naturally reflected in the cross-license arrangements and in the terms each offered to infringing appellees when negotiating licenses for the patented cutout device.

The facts set forth above are wholly in accord with the District Court's findings of fact. The Court also found, in respect of the Line-Southern cross-license agreements, among other things, in substance, as follows:

> The agreements were entered into in good faith, not for the purpose of fixing prices of cutouts, but to permit the manufacture and sale of the much less expensive device covered by the subservient Schultz patent,

to facilitate the negotiating of licenses and to provide royalty income (FF 34, R. 514).

The minimum prices established by Line were only for structures within the ambit of the claims of its own patents, *i.e.*, the Schultz and Kyle patents (FF 29, R. 513).

There was no agreement, either express or implied, between Line and Southern with respect to prices of cutouts other than that embodied in the written cross-licenses (FF 32, R. 514).

The inflexible intention to insist upon price control existed independently in each of the patent owners prior to any discussions or arrangements between them (FF 34, R. 514).

The agreements were limited to the commercially practicable device covered by the subservient Schultz patent and did not create additional power for price control of the licensed cutouts over that which each had before entering into the agreements (FF 34, R. 514).

Licensing Under the Line and Southern Patents

At the time of the 1938 Line-Southern cross-license, most of the appellees were manufacturing and selling an improved dropout fuse cutout which was within the allowed claims not only of Line's Schultz application but of Southern's Lemmon application, and many of them were also infringing Line's Kyle patent on the wet-process porcelain housed cutout (FF 15, R. 506; Ex. 7, R. 601-5).

Immediately after the execution of the 1938 cross-license agreement, Southern began offering licenses under

its own and Line's patents. Kearney, which was a party to the interference, was approached first. The Kearney license was executed October 3, 1938 (FF 14, R. 505).

After licensing Kearney, Southern notified General Electric, Schweitzer & Conrad, Matthews, Railway and Westinghouse that Kearney had signed a license and offered to them a license containing substantially the same terms as the Kearney license (FF 14, R. 505). Since, however, neither the Lemmon nor the Schultz patents had actually issued out of the Patent Office, these companies put Southern off with the arguments that they did not know what claims of the patents would be allowed by the Patent Office (Ex. 15, R. 640, at 642; R. 325).

On March 7, 1939, the Lemmon patent issued (followed by the Schultz patent in October), and shortly thereafter Southern notified several of the infringing appellees that the patents had issued and sent out formal infringement notices (FF 15, R. 506).

Before accepting any license, a number of the infringing appellees made determined efforts to find evidence invalidating the Lemmon and Schultz patents. They individually caused extensive patent and prior art searches to be made both in this country and abroad to find evidence of anticipation. At the suggestion of Matthews they cooperated in exchanging with each other the results of their investigations. However, their efforts were unsuccessful, and it was reluctantly concluded that there was little hope of invalidating the Lemmon and Schultz patents (FF 15, R. 506).

A number of the infringing appellees then individually attempted to design satisfactory dropout cutouts which would not infringe the patents of Line and Southern. These efforts met with only partial success (FF 15, R. 506).

While the patented dropout cutout was only one of a number of dropout cutouts in use, it had certain commercial advantages not afforded by any other type of cutout (FF 15, R. 506-7). Each infringing appellee was, therefore, confronted with the alternative of taking a license under both the Line and Southern patents or discontinuing its manufacture of a device for which there was a substantial demand in the trade (FF 15, R. 507).

From the outset, both in the form of license offered to the infringers and otherwise, Southern and Line each had, according to its own long-established policy, consistently and unyieldingly maintained the position that, to protect its business, it would not grant any license which did not contain minimum price provisions with respect to devices licensed under its patents (FF 12, R. 504; FF 32, 34, R. 514).

The refusal to grant licenses without a price limitation met with considerable hostility from the infringers. This hostility resulted in the extensive efforts by the infringers referred to above either to invalidate or avoid the patents of Line and Southern (FF 21-4, R. 509-11; Op., R. 496-8).

Having concluded, however, that the patents were valid, and having failed to sway the licensor from its demand for minimum price control on such patents despite the opposition of the infringers to any price limitation whatsoever, the infringers then endeavored to limit the scope of the price control by cutting down the number of patents with respect to which price limitation was to be exercised and by excepting various forms of the devices from such limitation (FF 21-4, R. 509-11; Op., R. 496-8).

Furthermore, they objected to dealing with Southern as the licensor because the great bulk of the dropout cutouts sold by the infringers at that time were enclosed in the

wet-process porcelain box covered by the Kyle patent, under which Southern did not have licensing rights. This would have necessitated dealing with both Southern and Line as to enclosed dropouts and have resulted in being burdened with dual provisions as to royalties and price limitations. They also were opposed to Southern as a licensor under the proffered license agreements because, among other reasons, the prices of enclosed dropout cutouts covered by Southern's patent would be determined by the higher prices of Southern's open dropout cutouts, despite the anomaly that enclosed dropout cutouts of the type covered by Line's Kyle patent were less expensive to make and normally sold for less than open dropout cutouts (FF 16, R. 507).

Therefore, the shift from Southern to Line as the prospective licensor, called for by the facts stated above, was informally made some months before Line and Southern's cross-license of 1940 (FF 17, R. 507).

In August, 1939, Line, as licensor, tendered several of the infringing appellees three types of license:

(a) a license under the Line and Southern double-hinge dropout patents alone, limited to manufacture and sale of open dropout fuse cutouts;

(b) a license under Line's enclosed fuse cutout patents;

(c) a license under the Line and Southern double-hinge dropout patents and Line's enclosed fuse cutout patent, under which the licensee could manufacture both the open and the enclosed patented dropout fuse cutouts (FF 17, R. 507-8).[1]

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[1] The licensee could, of course, also manufacture and sell enclosed non-dropout fuse cutouts.

Eventually, between March 15, 1940, and March 24, 1944, the various infringing appellees accepted at different times one or another of the forms of licenses thus tendered them (FF 19, R. 509; Exs. 94-95, R. 819-51; Ex. 134, R. 902; Ex. 142, R. 949; Ex. 150, R. 991; Ex. 209, R. 1120; Ex. 212, R. 1122; Ex. 229, R. 1134; Ex. 234, R. 1179; Ex. 282, R. 1286; Ex. 306, R. 1323).[1] While at the time each of the licensees accepted a license it was aware that those of the licensees who had previously taken licenses had done so, there was, as found by the District Court, at no time any agreement or understanding between any of the licensees that licenses would be taken and no such license agreement was entered into as a result of any conspiracy (FF 21-22, R. 509-10; FF 27, R. 512).

Operation Under the Licenses

After each licensee executed its license, the manufacture and sale of the licensed patented devices by that licensee were in accordance with the written terms of its license agreement. The evidence clearly establishes that the minimum prices provided for in the license were established by the licensor Line and that there was no concerted action or agreement with the licensees as to what such prices should be. The Government refers to two meetings which were

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[1]Pacific, Porcelain, Johnson and Royal took no part in the negotiations which preceded the 1940 cross-license agreement between Line and Southern (cf. Ex. 145, R. 987). These were all relatively small companies, but, like the other licensees, were compelled to take licenses in order to continue lawfully the manufacture and sale of their infringing products (FF 26, R. 512). Pacific's and Porcelain's licenses were dated November 15, 1940, Johnson's, June 15, 1943, and Royal's, March 24, 1944 (FF 19, R. 509).

held in August, 1940, and January, 1941, but the evidence shows that these meetings were for an entirely proper purpose and that nothing occurred at those meetings which can be criticised in any respect. These meetings, which were held at the suggestion of Line, were for the purpose of coordinating information obtained as to the diverse types of dropout fuse cutouts manufactured by the respective licensees, classifying the cutouts and explaining Line's basis for determining prices for comparable devices. The licensees were to be limited only as to prices for patented dropout fuse cutouts "comparable in respect to general type and purpose, ampere and voltage rating and rupturing capacity to dropout fuse cutouts manufactured and sold by licensor" (*e.g.*, Ex. 94, at R. 822). Since a considerable number of different types of dropout fuse cutouts manufactured and sold by the several licensees fell within the claims of the licensed patents, the task of assembling information for the purpose of fairly classifying these different cutouts with cutouts manufactured by the licensor and explaining the classifications to the licensees was a substantial one. The District Court specifically found that there was no discussion of any price or prices to be established by Line for cutouts at either of these meetings (FF 28, R. 512-3).

Each licensee, from the effective date of its license, except for inadvertence or mistake, observed those minimum selling prices, as provided for in the several license agreements (FF 31, R. 513; Ex. 7, R. 609).

As complaints were made from time to time to Line by various licensees that certain other licensees had failed to follow the minimum prices, Line wrote to the alleged infringer to remind it of the limitation upon its license.[4]

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[4]See *Virtue* v. *Creamery Package Manufacturing Company, et al.*, 227 U. S. 8, 37-8 (1913).

There was, however, as found by the District Court, no joint action by way of policing or otherwise taken between Line and any of the licensees, and there was no agreement among the various licensees, either with Line or Southern or among themselves, that they would assist in policing the industry (FF 31, R. 513-4).

All the devices for which minimum prices were established by Line were not only covered by Line's Scnultz patent but were comparable to, and competitive with, devices which Line, itself, manufactured and sold or which it was ready to manufacture and sell to its customers on special order (FF 33, R. 514).

Not only are the District Court's findings entirely in accord with the facts set forth above, but the Court also found with respect to the licenses taken pursuant to the cross-licensing agreement, in substance, as follows:

> The price limitation provisions contained in the various license agreements were insisted upon by the patent owner and were intended and reasonably adapted to protect its own business and secure pecuniary reward for its patents, and the classification schedules attached to the licensed agreements were only such as were reasonably necessary to protect the business of the licensor and implement the license agreement to prevent evasion by a licensee of lawful price limitation provisions (FF 29, R. 513; FF 32, R. 514).
>
> Each of the licenses was taken and granted in good faith, the parties to the licenses believing a license under the patents to be necessary in order lawfully to continue to manufacture and sell dropout fuse cutouts (FF 32, R. 514).

Apart from the written license agreements, there was no agreement, express or implied, between the licensor and any licensee, or between any of the licensees, with respect to the prices of dropout fuse cutouts (FF 32, R. 514).

Competition among the appellees for business in these devices continued to be vigorous after the making of the license agreements (FF 35, R. 514-15).

Finally, the Court broadly found that there was no combination or conspiracy among any of the appellees to fix, maintain or control prices of dropout fuse cutouts or parts thereof or to restrain commerce or trade therein (FF 36, R. 515), and further found that the various licenses and cross-license agreements involved in this case not only did not restrain trade but on the contrary promoted and encouraged trade by making available numerous sources where the patented devices could be obtained and thus increased competition in such devices particularly with respect to design, quality and service (FF 35, R. 514-5).

The Principal Issues Presented

Stated very briefly, the facts are that Line and Southern each owns a dropout fuse cutout patent, the Southern patent being the broader and more basic, the Line patent covering a valuable improvement on the basic idea. These patents cover the *same* commercial device (not two different devices as the Government states), and no dropout fuse cutout of the type involved in this suit can be made without a license under *both* patents. Line and Southern, who were both manufacturing and selling the improved cutout, which was covered by the patents of both of them, were perforce

compelled to cross-license each other or cease manufacturing and selling the improved device.

During 1940 to 1944, after extended and unsuccessful efforts by a number of appellees to avoid the necessity of taking a license either by inventing around the patents or by finding material which might enable them to attack the validity of the patents, the licensee-appellees, who were also manufacturing and selling the improved device and infringing the patents of Line and Southern, were forced to take licenses under both patents. Line had, as an incident of the aforesaid cross-license, received the right to sublicense under the Southern patent. Each license granted by Line, including that granted to Southern, was, in accordance with the principle approved in *Bement* v. *National Harrow Company*,[1] and in *United States* v. *General Electric Company, et al.*,[2] limited to sales at prices not lower than the prices followed by Line in its own sales of the apparatus covered by Line's own patents. The principal issues presented are, therefore:

(1) Did the District Court err in holding, as a matter of law, that it was not a violation of Section 1 of the Sherman Act for the licensor to grant licenses under these complementary patents limited to devices sold at prices no more favorable than those of the licensor, and for the licensees to accept such licenses in order to stay in the dropout fuse cutout business?

(2) Did the District Court err in finding as a fact and holding as a matter of law that there was no combination or conspiracy among the appellees, or any of them, to fix, maintain or control prices of dropout fuse cutouts or parts thereof, or to restrain trade or commerce therein?

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[1] 186 U. S. 70 (1902).
[2] 272 U. S. 476 (1926).

ARGUMENT

The Government tried and argued this case below on the theory that it would be able to prove a price-fixing combination and conspiracy outside the long established principle of the *Bement* and *General Electric* cases—that a patentee may lawfully limit licenses under valid patents to sales at specified minimum prices. The Trial Court having decided that no such combination or conspiracy existed, the Government now bluntly attacks the doctrine of the *General Electric* case. The second contention made by the Government is that the findings made by the District Court below should be overturned.

The Government's attack upon the *General Electric* case is based principally upon unsound economic generalizations which are inconsistent with the facts in this case. Furthermore, the Government's argument disregards legal and economic principles which underlie the provision of the Constitution and the patent laws enacted pursuant thereto.

For more than forty-five years this Court and many other courts have unanimously upheld the principle of *Bement* and *General Electric* cases. The ground of those holdings is that the protection of a patentee's business in the patented products is within the patent rights granted him as a reward for making and disclosing the invention. Neither the courts, which have unquestioningly applied the doctrine, nor Congress, which has frequently refused to enact legislation overruling the principle, would have so long followed those courses had the principle, as the Government contends, been economically unsound or contrary to the clear purpose of the patent laws and the nature of the rights under a patent.

Nor are the fundamental premises underlying the doctrine of the *General Electric* case difficult to understand. The right to exclude others from the manufacture, use or sale of an invention—the only right derived from a patent—is the price paid for the making and disclosure of the invention and takes nothing away from the public. After the issuance of a patent, the only trade in the invention which is permitted for seventeen years is the patentee's, unless he shall waive, in part or in whole, his right of excluding others by granting a license. Any such license, even if its scope be limited, *pro tanto* releases the restraint of the patent. The effect of limiting the license to products sold at or above specified prices is to permit the licensee to sell at certain prices, but leave the patentee and licensee in precisely the same positions as to sales at lower prices which they occupied before the granting of the license.

The economic results of the principle permitting a patentee so to limit his licenses are, among others, to encourage the granting of licenses and thus increase competition and to stimulate the making and use of inventions. The basis of, and the social benefits from, the doctrine of the *General Electric* case make it clear that the principle of that case is applicable whether the licensor grant one or many licenses.

The principles discussed above find apt illustration in the specific facts of this case, which were accurately and fully summarized in the District Court's findings of fact.

The Government's statement of the case has been written in apparent disregard of the fact that its view of the evidence was rejected by the trial court. The full and complete findings below cannot, however, be ignored. They are fully supported by the unequivocal testimony of numer-

[illegible] directly involved in the transactions and by a great volume of documentary evidence. The detailed findings of the District Court fully support the ultimate finding of fact that there was no combination or conspiracy among the appellees, or any of them, to fix, maintain or control prices of dropout fuse cutouts, or parts thereof, or to restrain trade or commerce therein, in violation of Section 1 of the Sherman Act.

Since the findings are crucial to any determination of this case, we turn first to a consideration of the findings contested by the Government and then discuss the legal principles applicable thereto.

I

THE FINDINGS OF THE DISTRICT COURT ARE SUPPORTED BY THE EVIDENCE AND SHOULD BE SUSTAINED.

A. Introduction.

The Court found that the Line-Southern cross-licenses were entered into in good faith, not for the purpose of fixing prices of cutouts, but to permit the manufacture and sale of the much less expensive device covered by the subservient Schultz patent, to facilitate the negotiating of licenses for that device and to provide royalty income (FF 34, R. 514).

With respect to the licensee-appellees, the Court found that each of the licenses was taken and granted in good faith, the parties to the licenses believing a license under the patents to be necessary in order lawfully to manufacture and sell dropout fuse cutouts, and that, apart from the written license agreements, there was no agreement, express or implied, between the licensor and any licensee, or between any of the licensees, with respect to the prices of dropout fuse cutouts (FF 32, R. 514).

The Government has sought in its brief to undermine these findings by asserting at one point that the Court considered the license agreements "interrelated" and at another by suggesting that the Court found only an absence of a "binding commitment". The record supports neither of these contentions. The Court's findings, as summarized above, were explicit not only as to the independent negotiation of the licenses but as to the fact that there was at no time any agreement or understanding, express or implied, other than the written license agreements.

The District Court's findings are neither vague nor general. Its ultimate conclusion and finding, that appellees did not conspire to fix prices, is supported by a large number of concrete subsidiary findings, many of which are uncontested, which demonstrate the soundness and strength of the ultimate finding. Moreover, these findings are based on the unequivocal testimony of numerous persons directly involved in the transactions and by a great volume of largely undisputed contemporaneous documentary evidence. The Government challenges the foregoing findings; but it has not in its brief presented the specific evidence which it contends warrants this Court in reversing the District Court. Much more is required than a mere narrative statement of selected portions of the evidence and the Government's assertion that the findings below are incorrect.[1] The Government has a definite burden which it must meet on this appeal, but which it leaves wholly unsatisfied.

To meet this burden it must first show that the District Court's findings are not supported by substantial evidence and are "clearly erroneous", giving "due regard" to "the opportunity of the trial court to judge of the credibility of the witnesses" (Rules of Civil Procedure, Rule 52). But even this is not enough. In addition, it must show that the evidence affirmatively establishes the conspiracy it attempts to prove. This is a particularly heavy burden inasmuch as

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[1]Moreover, these consist entirely of a few excerpts from *ex parte* documents to which others than the authors were not parties and which most of the appellees had never seen. They obviously are not binding on the other appellees without proof *aliunde*, which the Government did not produce. *Winchester & Partridge Manufacturing Company* v. *Creary et al.*, 116 U. S. 161 (1885); *Glasser* v. *United States*, 315 U. S. 60 (1942); *Steger* v. *United States*, 233 Fed. 510 (C. C. A. 2d, 1916).

the District Court weighed the credibility and probative value of a substantial amount of unimpeached oral testimony presented by numerous witnesses who had participated in the transactions and were familiar with underlying considerations which had motivated appellees' course of conduct.

The same items of evidence which are relied on here by the Government were vigorously emphasized by it below. The Court weighed the conclusions and inferences which the Government urged be drawn from them against the overwhelming and undisputed evidence which was inconsistent with them and properly found in appellees' favor.

Well-defined tests which must be met before a conspiracy or combination violating the Sherman Act can be found have been laid down by this Court. The essential and necessary element of the offense is the *fact* of an unlawful agreement, express or implied.[1] For this Court to overrule the findings of the District Court and make the affirmative findings which the Government urges, the Government must show by a clear preponderance of the evidence that appellees worked together understandingly with a single

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[1] *Braverman* v. *United States*, 317 U. S. 49, 53 (1942); *United States* v. *Falcone*, 311 U. S. 205, 210 (1940). To the same effect see *e.g.*, *Direct Sales Co.* v. *United States*, 319 U. S. 703 (1943); *Morrison* v. *California*, 291 U. S. 82 (1934); *American Column & Lumber Company* v. *United States*, 257 U. S. 377 (1920); *United States* v. *Andolschek*, 142 F. (2d) 503 (C. C. A. 2d, 1944); *Bacon* v. *United States*, 127 F. (2d) 985 (C. C. A. 10th, 1942); *Hammer* v. *United States*, 134 F. (2d) 592 (C. C. A. 5th, 1943); *Schneller* v. *United States*, 143 F. (2d) 544 (C. C. A. 6th, 1944); *Nash* v. *United States*, 229 U. S. 373 (1913); see Sayre, *Criminal Conspiracy*, (1922) 35 Harv. L. Rev. 393, 396.

design for the accomplishment of a common unlawful purpose,[1] that they joined "both mind and hand" in the enterprise, that there was "informed and interested cooperation, stimulation and instigation" to further the objects of an unlawful undertaking.[2]

The evidence, considered in the light of these requirements, totally fails to support the attack which the Government has made on the District Court's findings.

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[1]*Braverman* v. *United States*, 317 U. S. 49, 53 (1942); *United States* v. *Falcone*, 311 U. S. 205, 210 (1940); *Gebardi* v. *United States*, 287 U. S. 112, 121 (1932); *Wong Tai* v. *United States*, 273 U. S. 77, 81 (1927); *Frohwerk* v. *United States*, 249 U. S. 204, 209 (1919); *Williamson* v. *United States*, 207 U. S. 425, 447 (1908); *Bannon and Mulkey* v. *United States*, 156 U. S. 464, 468 (1895); *Dealy* v. *United States*, 152 U. S. 539, 547 (1894); *Pettibone* v. *United States*, 148 U. S. 197, 202 (1893); *United States* v. *Britton*, 108 U. S. 199, 204 (1883); *United States* v. *Hirsch*, 100 U. S. 33, 34 (1879).

[2]*Direct Sales Co.* v. *United States*, 319 U. S. 703 (1943).

B. The District Court properly found there was no price-fixing conspiracy between Line and Southern.

The Government contends that Line and Southern agreed upon a plan to fix prices of dropout fuse cutouts and parts throughout the industry in 1938 and that in carrying out this plan they were subsequently joined from time to time by the various licensees in a price-fixing conspiracy which eventually embraced all members of the industry. Therefore, the genesis of the alleged conspiracy is asserted to be in the arrangements made between Line and Southern.

Since, as the District Court held, the cross-licenses between Line and Southern were legal *per se*, the remaining question which the Court had to answer was whether they were executed to erect a "screen" to conceal and effectuate an over-all plan to price-fix the entire field of dropout fuse cutouts whether patented or not. The principal facts which led the Court to answer this question in the negative are undisputed. They consist of the patent conflict confronting the parties, the documentary evidence of the negotiations, and the manner in which the patent controversy was resolved, *i.e.*, the cross-license agreements.

The Lemmon and Schultz patents are respectively dominant and subservient patents covering the device which both Line and Southern were then and still are manufacturing and selling. Neither their validity nor relationship are in issue in this case, as stipulated by the Government (Uncontested FF 9-10, R. 503-4; Ex. L-22, R. 71). In other words, as the Court found,

> "no one can legally make the commercially acceptable dropout fuse cutout disclosed by the Schultz patent without obtaining a license under both patents" (Uncontested FF 10, R. 503).

The device as manufactured under the Lemmon patent was, in comparison with the improved Schultz device, far too complicated and expensive for commercial acceptance and had, in fact, never been manufactured commercially (Uncontested FF 7, R. 503; R. 122-3). Similarly, the competitors of Line and Southern, the other appellees, were also manufacturing the improved dropout device within the scope of the allowed claims of the Lemmon and Schultz patents and would have had to deal with both Line and Southern had they desired to continue the manufacture and sale of the device lawfully (Uncontested FF 10, R. 503-4; FF 15, R. 506; Ex. 7, R. 601-5). Therefore, it was commercially necessary if not absolutely necessary that the licenses under the two patents be made available from a single source.

Line and Southern were brought together by the action of the United States Patent Office, which had placed their respective patent applications in interference. Between 1934 and 1937 Line and Southern had fought the interference to a finish in the Patent Office. The negotiations which ultimately led to the cross-license of 1938 were not opened until after proceedings before the Interference Examiner, the Law Examiner and the Board of Patent Appeals resulted in Lemmon's being awarded the dominant claims for a double-jointed hinge in the dropout cutout and Schultz's being awarded subservient claims for a double-jointed hinge in a dropout cutout with a tube supported by a fusible element (Uncontested portion of FF 11, R. 504).

Line opened the negotiations with Southern and suggested a cross-license which

> "should preferably be limited to this particular field, and it is not our thought that in working it out

> there should be any handicap to further independent development of inventions along this line by either your company or our company, or any company which should see fit to join with us" (Ex. 8, R. 613 at 614).

Line was led to this offer by the realization that

> "Southern State licked us, and there we were, all of a sudden, confronted with the fact that one of our competitors had the double hinge which was necessary to us at that time and still has been to make a dropout fuse, and we were in a predicament . . . The only thing we could start to do was try to wheedle out and get from the Southern State Equipment Company a license to use their double-jointed hinge, and we started to do it the best way we knew how" (R. 304-5).

Southern expressed its agreement that some form of licensing plan would be advantageous to all concerned (Ex. 9, R. 615), for the same reason that had led Line to make the proposal:

> "we would still have to make an agreement with Line Material before the two interrelated patents could be used" (R. 124).

The cross-license of 1938 accomplished the purpose for which these negotiations were begun. Each company was freed to make, use and sell a dropout fuse cutout manufactured under the patent of the other, and, to permit licensing of the interrelated patents as a unit, Southern was given rights to sublicense under the Schultz patent (Ex. 12, R. 623). The positions of the parties with respect to sublicensing were reversed in the cross-license of 1940, in that

Line was given the right to sublicense under Southern's Lemmon patent (Ex. 86, R. 786).

Under the 1938 agreement Southern's license to Line was conditioned on Line's following Southern's prices with respect to products made by Line under Southern's patents, and Line's license to Southern was conditioned on Southern's and its sublicensees', under Line's patents, following Line's prices with respect to products made solely under Line's patents (Ex. 12, R. 623, at 633). Under the 1940 agreement, Line's license to Southern was conditioned on Southern observing Line's prices with respect to devices covered by Line's patents (Ex. 86, R. 786, at 794).

The cross-licenses themselves, however, are inconsistent with the contention of the Government that price fixing was their object. Under neither of the agreements was there provision for joint price-fixing or provisions requiring either of the parties to fix prices under its own patents. Under both the agreements the dominant Lemmon patent was licensed only for cutouts in which the

> "circuit interruption is caused by the thermally initiated rupturing of a current carrying element in an expulsion tube",

i.e., for use with the Schultz improvement (Ex. 12, R. 623, at 625; Ex. 86, R. 786, at 788). Likewise, Line withheld from Southern the right to grant sublicenses under the Kyle patent and its other enclosed cutout patents (FF 16, R. 507). Thus, the cross-license was carefully limited as to the rights exchanged, instead of including any and all inventions of the parties. These facts are inconsistent with the Government's theory. Such action is exactly the opposite of that which might be expected from parties conspiring

to control prices in an industry. On the contrary, one would expect that if a price scheme was being set up it would be made of the broadest possible scope, in the hope that as a result of pooling a large number of cutout patents leverage would be given to effectuate their price-fixing scheme.

Moreover, representatives of both Line and Southern, who were called as witnesses by the Government, testified unequivocally that the written cross-license agreements embodied the entire understandings reached by the two companies (R. 112, 139, 305). There was no testimony to a contrary effect. Nor do the memoranda taken from appellees' files covering the conferences between the parties during the period of negotiations in any respect refer to a joint or concerted price-fixing scheme. Indeed, the memoranda reflect the parties' primary interest in untangling the patent conflict.

These price limitations found their way into the respective licenses, not as the result of any over-all understanding, but as the result of the separate independent pre-existing policies of these two concerns. The District Court found:

> "The inflexible intention to insist upon price limitation existed independently in each of the patent owners prior to any discussions or arrangements between them" (FF 34, R. 514).

This finding is supported both by the testimony and the conduct of the parties. The record shows that prior to negotiations between Line and Southern, Line had always insisted on price control under its cutout patents, as had Southern (R. 319; Ex. S-1, R. 1774). Indeed, it is undisputed that that had always been the separate and independent policy of both Line and Southern (Uncontested FF 13,

R. 505). The pre-existing independent policies were explained by responsible officers of the respective companies, and their testimony fully supports the District Court's findings. Thus, Kyle, President of Line, testified:

> "The Line Material Company, Mr. Quarles, from the very beginning and the Line Material through it all up to this time, believed that it had a perfect right to license under its patents, that it had a perfect right to set the prices for its own protection under its patents, and that no one else but itself would have that right, and the Line Material never gave up that right pertaining to the principal cutouts that it was interested in, and it fought right straight through for that principle" (R. 304).

And again, in referring to the position taken by Line at the initial conference with Southern concerning the cross-licensing of the patent, he stated:

> "Our attitude of price control at that time, Mr. Quarles, and at this time and previous to that, was under the important patents that the Line Material Company considered important to it for the protection of its business, that royalties must be paid, and that it had a right to set a price on the items made under the patent for the protection of its own company, sir" (R. 305).

The testimony of Mr. Lemmon, Chief Executive Officer of Southern, was equally explicit. In answer to the question why he had been so consistent on insisting on price control, he stated:

> "We had been for years manufacturing such equipment, and we felt that price control was a very important factor—would be a very important factor

in protecting our own business, in addition to bringing us in royalty, greater royalties, but the protection of our own business——

"Q. To what extent were the royalties a factor?

"A. Well, if the prices were higher prices, why, the royalties would be larger because they are on a percentage basis. *That is a relatively small matter compared with the protection of our own business.* (Italics supplied.)

"Q. In other words, you might get a small amount of royalties and lose the business if there was no price protection?

"A. Exactly" (R. 137-8).

Against this overwhelming evidence the Government advances principally excerpts from two documents. It first refers to a letter of Line's patent counsel, Brown, to Southern (Ex. 8, R. 613) containing the following sentence:

> "we have come to the conclusion that if the patents and applications which you own in this particular field were combined with those which we own and control in the same field, a very substantial position might be presented to the industry as a whole."

It is not necessary to go beyond the context of this letter, however, to demonstrate that the reference to a substantial position in no way was intended to indicate price-fixing, joint or otherwise. The reference was directed solely to the desire of the two companies to place themselves in a position simply and effectively to grant licenses under overlapping patents so that they and others might lawfully manufacture dropout fuses. The sentence following the one quoted above goes on to say:

> "There might thus be formed the nucleus of a cross-license agreement which should be so worked as to

be fair to all concerned and at the same time materially diminish the expense and annoyance incident to further interference and court proceedings which it seems to us must inevitably follow unless some satisfactory settlement is made." (Italics supplied.)

The letter closes with the suggestion that the settlement be limited to the dropout [illegible] and that there should be imposed no

> "handicap to further independent development of inventions along this line by either your company or our company, or any other company which should see fit to join with us."

The letter does not discuss or make any reference to price control.

The Court rejected the Government's strained construction of these documents, and from them, as well as other substantial evidence, found that one of the purposes of the cross-license agreement was "to facilitate the negotiation of licenses" (FF 13, R. 505).

The Government also refers to another letter from Brown to Southern's attorney indicating his understanding of the position taken by Southern's President, Mr. Lemmon. That letter (Ex. 11, R. 618), following a long and intricate discussion of the patent situation, refers to the desirability of "ultimately arriving at a setup which will make it easier for Mr. Lemmon to bring about stabilization in the dropout fuse and repeater fuse field". By isolating and emphasizing the word "stabilization", the Government seeks to have it inferred that the parties were furthering an understanding to stabilize prices in the industry; but Mr. Brown, in the very next sentence of his letter, demonstrates that he was referring not to prices at all but again

to the desirability of facilitating the licensing of all possible patents, thus making it demonstrably clear within the text of the letter itself that the concern of Mr. Lemmon was with eliminating from the industry the disruptions created by the existence of conflicting patents; in other words, again using the words of the letter, to give "licensees under the present contemplated arrangement a complete bill of health."

Surely such tenuous arguments as these cannot be used to overturn the cumulative effect of the evidence heretofore reviewed, all to the contrary, upon which the District Court based its findings.

C. The District Court properly found there was no price conspiracy among the licensees or between them and Line and Southern.

1. Introduction.

The licenses granted at various times by Line to the several licensees were lawful on their faces. It is also an admitted and accepted fact in this litigation that prior to being licensed each of the licensees was infringing the valid drop-out fuse cutout patents of Line and Southern (FF 15, R. 506; FF 9, R. 503; Ex. L-22, R. 71; R. 303, 332, 413, 418, 433-4, 449, 451; Ex. GE-18, R. 1945; Ex. GE-21, R. 1948;

Ex. GE-26, R. 1953; Ex. GE-32-3, R. 1957-66; Ex. W-13, R. 2302; Ex. So.-13, R. 1791). By accepting a lawful license from Line under these patents, a licensee was in no way entering an illegal conspiracy and combination or creating one.[1]

The Government contends, however, that the various licenses were part of an illegal understanding to which the licensees and Line and Southern were parties to fix prices in the dropout fuse cutout industry. Again, as in the case of the Line and Southern cross-licenses discussed above, the Government seeks to have this Court infer the existence of an additional understanding from isolated bits of evidence culled from the record and frequently presented out of context. The District Court upon consideration of the evidence as a whole—oral as well as written—rejected the Government's contentions. It found that each of the licenses was taken in good faith, the licensees believing a license under the patents to be necessary in order lawfully to continue to manufacture and sell dropout fuse cutouts (FF 32, R. 514); that the licenses were taken without any agreement or understanding between the licensees to do so and were not taken as the result of a conspiracy (FF 21-22, R. 510-1; FF 27, R. 512); that there was no other agreement, express or implied, between the licensees and the licensor or between any of the licensees, with respect to the prices of dropout fuse cutouts (FF 32, R. 514); and, finally, that there was no combination or conspiracy to fix, maintain or control prices of dropout fuse cutouts or parts thereof or to restrain commerce or trade therein (FF 36, R. 515).

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[1]*Gasoline Products Co., Inc.* v. *Champlin Refining Co.*, 46 F. (2d) 511, 514 (S. D. Maine, 1931); *United States* v. *Hartford-Empire Co., et al.*, 46 Fed. Supp. 541, Transcript Record USSC, p. 12,492.

These findings are abundantly supported by the evidence. The record contains the explicit testimony of key persons participating in the transactions, each of whom unequivocally testified that, except for the price limitations in the written patent licenses, there were no agreements or understandings of any kind among the licensees or between them and Line and Southern with respect to prices on dropout fuse cutouts (R. 215, 221, 280, 392, 423, 476), that there were no agreements or understandings between the licensees themselves with respect to the taking of licenses (R. 336, 352-3, 378-9, 398-9, 481), and that minimum prices on dropout fuse cutouts were established under the Line licenses by Line, independently of Southern and without agreement of the licensees (R. 267-8, 312-3, 358, 387-8, 475-6). There was no testimony to the contrary.

This testimony, moreover, does not stand alone. It is corroborated by the actions of the licensees both prior to and subsequent to the taking of the licenses—evidence which in large part consists of contemporaneous documents. The actions of the licensees were thoroughly inconsistent with the Government's theory that there existed an over-all price conspiracy to which they were parties and which they sought to screen through the acceptance of patent license agreements containing minimum price control provisions.

The licensees strenuously sought to gather evidence to invalidate the patents, spending substantial sums of money thereon both in searching the prior art and in seeking to develop commercially acceptable devices which would not be infringing. Moreover, they openly opposed price control, and, when it appeared that this opposition would be unsuccessful, they did everything in their power to narrow the scope of the price limitations of the licenses. Even after

the licenses were executed, they continued in their efforts to avoid imposition of price control, and there is no evidence of their cooperation with the licensor at any time on this regard. The licensees yielded and took limited patent licenses with price limitations only when it was apparent that the licensor was adamant and that no limitation otherwise than withdrawal from manufacture was available.

The evidence as to the actions of the licensees which we have thus summarized is in the main undisputed and certainly not seriously challenged. We discuss it briefly below to demonstrate the strength of the licensees' resistance and the complete absence from their conduct of any conspiratorial design. Had the licensees desired to fix prices or to have prices fixed under cover of the subterfuge of patent licenses—had this been their purpose and the objective which they sought to further—their actions would have been precisely to the contrary of the course of conduct reviewed below.

2. Refusal of the Infringers to Negotiate Prior to the Issuance of the Patents.

When Line and Southern learned through final Patent Office action that patents would issue to each of them with claims covering the devices then being manufactured by the licensees, each naturally was eager to exploit its invention and offered licenses before the patents actually issued. Here was an appropriate opportunity for the licensees to accept price fixing under patent licenses if there had been an illegal understanding, but the licensees expressed a complete unwillingness to accept licenses. On the contrary, they put Line and Southern off, preferring to wait until the patents had actually issued so that the exact form of

the claims as granted could be analyzed (R. 325, 419, 429, 479; Ex. 15, R. 640; Ex. So.-6-7, R. 1782-3; Ex. SC-5, R. 2050).[1]

3. Efforts to Invalidate and to Avoid the Patents.

When the patents issued, the position of the licensees as infringers became clear.

But after receiving notices of infringement, instead of rushing to embrace price control, as the Government would have it believed, the licensees first exerted every effort in their power to discover evidence of anticipation to invalidate the patents (FF 15, R. 506). Thus the Vice-President of Schweitzer & Conrad testified:

> "Well, we began a search for prior art. We searched every clue we could get hold of in California, some of them; Texas, some of them; and all over Europe. We searched, ourselves, through our own connections, and we employed professional people to make a search for us" (R. 430).

General Electric, Matthews, Schweitzer & Conrad, Westinghouse, Railway and Kearney individually caused extensive prior art searches to be made in this country, and some of them made searches in Germany, France, England and Switzerland, in the hope that prior art or evidence of prior public use would be uncovered (R. 326-7, 364-5, 430-1, 447; Exs. So-9-10, R. 1785-6; Exs. GE-6-16, R. 1923-43; Exs.

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[1]The only exception was Kearney, which took a license from Southern while the patents were still in the application stage because it had had bad relations with Line and feared that it might not again have the opportunity to take a license (FF 25, R. 512).

GE-31-33, R. 1956-66; Ex. W-10, R. 2028; Ex. M-9, R. 2042).[1]

Not wishing to leave any stone unturned, the licensees exchanged the results of their individual searches in an effort to find a basis for a successful defense against the patents by combining and collating their information (R. 328, 365-6; Exs. 32-34, R. 680-5; Ex. 40, R. 692; Ex. GE-17, R. 1944; Ex. GE-19, R. 1946; Ex. GE-26, R. 1953; Exs. W-11-12, R. 2299-301). At the suggestion of Matthews, they met on June 1, 1939, to exchange, combine and evaluate the results of their individual searches and to see whether anyone had "anything that might be used to void the patent" (Ex. GE-26, R. 1953; FF 15, R. 506; R. 365-6). Finding the results of their searches unpromising (R. 334-5, 365-6, 431, 480; Ex. 50, R. 705), they resumed their individual efforts and met again on August 10, 1939. Their efforts continued to be unsuccessful, however, and the consensus was that there was little or no hope of invalidating the patents (R. 330, 341, 432, 448; Exs. GE-32-33, R. 1957-66; Exs. W-13-15, R. 2302-10). Nevertheless, they still persisted in their efforts to find invalidating evidence (Exs. GE-51-55, R. 1990-8; Exs. W-13-15, R. 2302-10; R. 350, 367-8). However, in the end the conclusion of all was similar to that expressed in the report of the General Electric patent department to its Board:

> "we frankly do not have a leg to stand on" (Ex. GE-60, R. 2004),

in which opinion the General Electric patent department was confirmed by outside counsel whose advice was sought (GE-33, R. 1963).

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[1]Similar earlier efforts had been made in anticipation of the issuance of the patents (*e.g.*, R. 321; Exs. GE-2-5, R. 1914-22).

In addition, a number of the licensees, particularly General Electric, Westinghouse, Matthews and Schweitzer & Conrad, with renewed vigor,[1] directed their attention to attempts to design satisfactory cutouts which would not infringe the patents of Line and Southern (R. 298-9, 350, 353, 355-6, 374, 392-5, 436-7, 449-54, 468-9; Exs. GE-18, R. 1945; Ex. GE-32, R. 1957; Exs. GE-63-68, R. 2007-19; Exs. W-16-22, R. 2311-21). These efforts met with only partial success (FF 15, R. 506). The most conspicuous success was achieved by Westinghouse, whose efforts to avoid the Kyle patent culminated in the invention of Prestite, which was put on the market late in 1940 before execution of the Westinghouse license (R. 465-6).

In the end the infringing prospective licensees were obliged to recognize that it was a question of taking licenses under the Line and Southern patents or facing damage suits for past infringement and withdrawing from the business for the future. Faced with the necessity of taking licenses, the licensees expressed their opposition to minimum price provisions and sought to eliminate all price limitation. Thus the President of Line testified that General Electric "fought tooth and nail never to have price control", and the evidence shows it instructed its representatives if possible not to accept an agreement with price control (R. 336). General Electric, Matthews, Schweitzer & Conrad and Westinghouse expressed their opposition forcefully (FF 21-4, R. 509-11; R. 132, 199-200, 221, 309-11, 317, 336, 370-1, 450; Ex. 21, R. 662; Ex. 50, R. 705; Ex. W-27, R. 2326; Exs. GE-32-33, R. 1957-66; Ex. M-1, R. 2025). With few

[1]Earlier unsuccessful efforts had also been made to design around the improved Line device (*e.g.*, R. 602-5, 755-7; Ex. GE-4-5, R. 1921-2; Ex. GE-32, R. 1957).

exceptions the other licensees were alike in their opposition to any price limitation (R. 311, 336, 368, 480).[1]

While these various efforts to avoid the patents and price limitations in the licenses were in progress, the licensors did not stay idle. They naturally wished to put an end to the infringements and insisted upon price restriction in the licenses. As the chief executive of Line testified: "We were just getting tired of the way they were treating us" (R. 307). Line's policy was stated succinctly and clearly by Brown in a letter to Schweitzer & Conrad in October, 1939:

> "It is certain that, if license[e]s expect to indiscriminately cut prices of the licensed articles, then Line Material will have no alternative than to refuse licenses under its patents, to seek injunctions preventing infringements, and to ask damages for such infringements" (Ex. 68, at R. 739).

Southern was equally adamant (R. 190).

4. Efforts to Limit the Scope of the License Provisions.

The licensors having remained firm in their insistence that the licenses should contain minimum price limitations, the licensees next tried to limit the scope and applicability of such conditions. The so-called "standard" license, which was originally offered to the licensees, included eleven issued

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[1]The licensees Porcelain, Pacific, Royal and Johnson never had an opportunity to express themselves on the matter of price control. They took no part in and had no knowledge of the negotiations which preceded the 1940 agreement between Line and Southern, and the licenses were presented to them on a "take it or leave it" basis, their only alternative being to discontinue the manufacture and sale of the patented articles or defend suits for patent infringement.

patents and seven applications for patents, under all of which minimum price control was sought by the licensor (FF 16, R. 507; Ex. 18, R. 653). At the insistence of the licensees (R. 193-4, 330-1, 342-3; Ex. 21, R. 662; Ex. 48, R. 701; Ex. 57, R. 715) and despite opposition by the licensors (R. 331), most of these patents and applications were simply included in a non-assertion clause subject to no price limitation, with the result that no license granted by Line contained price conditions with respect to any but the Lemmon and Schultz and Kyle patents (*e.g.*, Ex. 94, R. 819).

Even with respect to the Kyle patent, General Electric, because of pending litigation, succeeded in obtaining a license under Kyle with no price control (FF 17, R. 508; FF 21, R. 509; R. 199, 481; Ex. 94, R. 819). Others of the licensees, particularly Matthews, most of whose business came under the Kyle patent, and Westinghouse, pressed for similar treatment without avail (R. 221-3, 370, 377, 402-3, 469, 481; Ex. 206, R. 1117; Exs. W-28-29, R. 2329-34; Ex. 71, R. 744; Ex. 74, R. 750; Ex. M-1, R. 2025).[1]

The licensees also sought, by narrowing the definition of the licensed devices and otherwise, to remove various types of cutouts from price control.

One of these attempts sought to exclude power and high voltage cutouts, leaving only distribution cutouts (R. 199, 348, 473-4, 481; Ex. GE-41, R. 1976; Ex. GE-43, R. 1979;

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[1]Matthews nevertheless accepted a license on the hope and expectation of shortly being able either to operate without it or cancel it, and thus avoid price control under Kyle (Ex. M-2, R. 2029; R. 373-4).

Exs. GE-44-48, R. 1980-7; Ex. 57, R. 715; Ex. 61, R. 729; Ex. W-27, R. 2326; Ex. W-31, R. 2338). These efforts, while not wholly successful, did result in the obtaining of concessions. Minimum price control was provided for only with respect to power fuses comparable to those of Line (R. 348), and in the Westinghouse and Schweitzer & Conrad licenses fuse cutouts above a certain rating were excepted from the licenses and hence from price control (R. 473-4; Ex. W-31, R. 2338; Ex. 234, R. 1179; Ex. 236, R. 1212; Exs. 229-230, R. 1134-74), and options were given to extend the license to the excluded devices without being subject to price control.

Similarly, Schweitzer & Conrad, while attempting to discover evidence invalidating the Lemmon and Schultz patents, had found prior usage with respect to its open single hinge dropout Semafor and boric acid power fuse cutouts by which it hoped to be able to limit the scope of such patents (R. 431-2). Accordingly, it informed Line that it would not take a license and subject itself to price control with respect to those devices (R. 432-3; Ex. SC-11, R. 2060). Thereafter, Line offered the license, which was ultimately signed (Ex. 230, R. 1172), in which these two types of cutouts were excluded by definition from the license and price control (R. 434-6, 468-9).[1] At the same time it received an option to bring the devices within the license, but not subject to price control. Westinghouse, also, pressed for (Ex. 50, R. 705; R. 434-5, 468-9) and received a similar concession from Line with respect to its dropout boric acid fuse cutout (Ex. 234, R. 1179; Ex. W-31, R. 2338; R.

[1] Later Line took the position that the open Semafor device was within the claims of the patent and brought an action against Schweitzer & Conrad (R. 436-7).

451-2, 473-4), and similarly received an option to bring that cutout under the license, but without price control if it was covered by Westinghouse patents (Ex. W-30, R. 2335; Ex. SC-12, R. 2062; Ex. 236, R. 1212; R. 434-6).

General Electric refused to accept Line's interpretation that sales for export to Canada are subject to price control (Ex. GE-70, R. 2022).

5. Subsequent Efforts to Invent Around the Patents and to Sell Other Devices.

General Electric's conduct is illustrative of the licensees' continued efforts to develop devices which were not infringing. Before the patents issued General Electric had already been at work trying to "get up something which would entirely avoid any patents" it felt might issue to others (R. 322-3). After the patents issued, and even after it had taken a license, far from complacently accepting price control, General Electric continued its efforts to change its designs to get away from the patents (Ex. GE-64, R. 2009). Its engineering department advised as late as June, 1941, that it was planning to work up a design completely outside the patents (Ex. GE-65, R. 2010), and money was appropriated for research to this end (Exs. GE-66-68, R. 2011-9), but the research was unsuccessful (R. 353).

Westinghouse developed and perfected Prestite, a substitute for the wet-process porcelain covered by the Kyle patent, so that by 1944 Prestite was used exclusively by Westinghouse in its enclosed cutouts (R. 454, 465-6), and none of its enclosed non-dropout cutouts were subject to the price provisions of the Line license.

Similarly, General Electric's Sales Department put particular emphasis on cutouts, which were not subject to price

control by Line, with the result that the proportion of its sales of licensed dropouts had declined from 62% in 1939 to 53% in 1944 (R. 357-8).

Schweitzer & Conrad and Westinghouse have put into production and pushed sales in both dropout and non-dropout boric acid fuse cutouts, also not subject to price control (R. 436, 465-6). Westinghouse also developed and marketed a competitive open non-dropout fuse, the BAL, and an automatic reclosing circuit breaker, the AR-1, which avoided the necessity of making a repeater fuse under the license (Ex. W-1, R. 2110; R. 454-5).

General Electric authorized expenditures within its organization for experiment and development to get "outside of the whole dropout situation", with the express intent of "avoiding the present patent and license situation" (Exs. GE-63-68, R. 2007-19; R. 353, 355-6).

Matthews, also, persisted in its efforts to get out from under Line's price control. It prosecuted a patent application on a dropout fuse cutout until it issued in 1941, only, however, to find that devices made under this patent infringed the patent of another (R. 393-4). In February, 1941, Matthews sought the aid of Porcelain Insulator Company of Lima, New York, to get cutout housings through a pressing process which would avoid the Kyle patent, but found its cost prohibitive (R. 394). Similarly, in 1941, it negotiated with Westinghouse for Prestite to avoid the Kyle patent, but again found the cost factor prohibitive (R. 394-5).

The theory that there was at some moment a "joining of mind and hand" evidenced by active cooperation and instigation with the purpose of furthering any scheme to fix prices for the industry does not accord with the facts of

record. The portions of the record referred to above demonstrate that the resistance of the licensees continued until Line put it to them flatly that they would either take licenses with price control or would be sued as infringers (*e.g.*, Ex. GE-39, R. 1974). And having been compelled by the patents to take such licenses, the licensees continued their individual efforts to invent non-infringing devices so as to be free from the price requirement and pushed sales of other devices. None of this is consistent with the Government's position. It constitutes, on the contrary, compelling evidence in support of the District Court's findings.

6. Meetings of the Infringers.

During the negotiation of the licenses and subsequently some of the licensees met together, on some occasions with Line and Southern. These meetings are heavily relied on by the Government in support of its position. But, examination of the evidence establishes that the meetings were not concerned with prices, but with business problems growing out of the licensing.

That, prior to accepting licenses, some of the licensees did meet from time to time and engage in discussion among themselves, is conceded. But this discussion was devoted to wholly legitimate ends. Their problems were common. These were, first, to avoid taking licenses at all, if possible, and, second, if licenses were necessary, to obtain them on the least onerous terms possible, including the elimination, or at least the limitation, of price control. These meetings, as has already been indicated, were held for the express purpose of seeking to avoid taking any licenses whatsoever, and the testimony and contemporaneous documents are wholly devoid of any suggestion that the licensees were

participating with the licensors in an illegal price scheme camouflaged behind patent licenses.

Thus the meeting of October, 1938, for example, attended by representatives of certain prospective licensees, resulted in the voicing of numerous objections to accepting licenses in any form and a decision to avoid any consideration of licenses until the patents in question had issued (Exs. 22-23, R. 663-8; Ex. 26, R. 673; Ex. 32, R. 680; Exs. So.-6-7, R. 1782-3; R. 325, 419, 428-9, 479).

Similarly, the meeting of June 1, 1939, was a continuation of the prospective licensees' efforts to obtain patent licenses unlimited as to prices. The correspondence preliminary to this meeting shows that it was initially suggested by Matthews in order that a further review could be made of the independent investigations which a number of the prospective licensees had undertaken to determine the possibilities of invalidating the patents by proof of anticipation (Exs. 32-4, R. 680-5; Ex. 40, R. 692; Ex. W-11, R. 2299; Ex. SC-7, R. 2055; Ex. GE-19, R. 1946; Ex. GE-26, R. 1953; Ex. GE-28, R. 1954; Ex. GE-31, R. 1956). At the meeting the validity of the Schultz and Lemmon patents was considered (Ex. 50, R. 705; R. 334-5, 365-6, 431-2, 480-1), as were certain common problems under the proposed licenses, such as royalties, the patents to be licensed, and the objection to accepting a license which would permit Southern to control prices on enclosed dropout cutouts, since Southern itself was not a manufacturer of such devices.

Disregarding the substantial amount of other evidence (both testimonial and documentary) relating to this meeting, the Government relies heavily upon and seeks to draw extreme inferences from a single sentence in a single

exhibit. This is a memorandum by Carlisle of Railway in which it is stated:

> "The decision was to go ahead and try to get a satisfactory agreement at a reasonable royalty and, possibly, get some price control into it" (Ex. 49, R. 703).

In the face of all the contrary evidence and the District Court's explicit findings, the Government urges that this statement establishes that the licensees were conspiring with the licensors to cloak an illegal price scheme behind patent licenses.

That this statement incorrectly reflects what actually was said and done at the meeting is, however, clearly demonstrable. First, it was repudiated by conferees Cooley of Matthews (R. 368) and Bobst of General Electric (R. 336-7).

Cooley testified:

> "The substance of the discussions at the meeting was not anything like Mr. Carlisle has said in his letter about possibly getting some price control in. If there was any real effort, it was to get the price control out. The price control was in the drafts of the agreement and I, for one, and I am certain that all the others there were opposed to price control and efforts were made to talk them out of it, but those efforts failed . . ." (R. 368).

The only other contemporaneous report of the meeting, contained in a memorandum prepared by the late Wagner of General Electric, says:

> "It was the consensus that if a satisfactory agreement could be made with a considerably lower royalty than 5 per cent, it would probably be best to

take licenses. Lemmon has refused to grant any licenses without price control" (Ex. 50, R. 705).

Furthermore, the Carlisle memorandum is patently incredible in the light of all the other facts. As Cooley and Carlisle testified, there never was a problem of "getting" price control into the licenses; it had always been there, beginning with the so-called "standard" licenses which were first offered in October, 1938 (Ex. 15, R. 640; Exs. 17-20, R. 652-61). This Carlisle himself admitted when he testified:

> "There wasn't any discussion at the meeting that the parties would try to get a price control provision in the license agreement, because there has always been a price control in it from the very beginning; before there was any agreement offered we were advised that it would contain price control" (R. 481).

With respect to the quoted sentence in his memorandum, he testified:

> "This was simply an informal statement from me to my superior and I intended to convey to him the possibility that although a number of objections had been raised to price control, that it was my belief that there would be price control in the agreement when it was finally offered to us" (R. 482).

If there had been any disposition of the conferees to "get" price control, the positive efforts to avoid price control and to invalidate the patents which took place subsequently would hardly have occurred.

The efforts to find prior art to invalidate the patents continued after the June 1 meeting, and on the morning of August 10, 1939, the same parties plus Kearney met, par-

suant to invitation by General Electric, again to consider the patent situation (Exs. 52-53, R. 709-11; Ex. 58, R. 721). At this meeting, as at the prior meeting, it developed that no one had been able to find any prior art which offered any substantial hope of invalidating the patents (R. 341, 432, 448; Exs. GE-32-33, R. 1957-66; Exs. W-13-15, R. 2302-10).

In the afternoon representatives of Line and Southern were invited to attend the meeting. The Government contends that at this continued meeting the parties decided to add the Kyle patent to the licenses and to use it to fix prices for all. That no such understanding was reached and that the licensees were in fact opposed to price control under the Kyle as well as under the other patents is clearly shown by the record.

Brown specifically testified that no such understanding was reached and that the licensees continued to object to price control (R. 221-3). For a considerable period after the August 10 meeting they also continued their efforts to find evidence of anticipation which would make any license unnecessary (Exs. GE-52-55, R. 1991-7; Exs. W-13-15, R. 2302-10; R. 350, 368). The license which was finally taken by General Electric did not contain provision for price control under the Kyle patent (FF 17, R. 508; FF 21, R. 509; R. 199, 481; Ex. 94, R. 819), and other licensees, particularly Matthews and Westinghouse, continued to resist price control under Kyle, although unsuccessfully (R. 221-3, 369-71, 377, 402-3, 469, 480-1; Ex. 206, R. 1117; Exs. W-28-29, R. 2329-34; Ex. 71, R. 744; Ex. 74, R. 750; Ex. M-1, R. 2025).

Contemporary records show clearly the attitude of Matthews, for example, which finally accepted price control

under Kyle, not because it wanted it, but because it hoped to be able in a short time to get out from under Kyle entirely (Ex. M-2, R. 2029; R. 373-4). And Westinghouse went on to develop Prestite, which avoided Kyle and which was put on the market in 1940 before execution of the Westinghouse license, with the eventual result that by 1944 Prestite was used exclusively by Westinghouse in its enclosed cutouts (R. 465-6). Finally, Line continued to offer, as it had in the past (Ex. S-16, R. 1797), a license under Lemmon and Schultz alone (Ex. 77, R. 762; Ex. 93, R. 817; R. 204-5).

The only remaining meetings relate to classification of devices. These meetings came about as a normal and necessary means for fair administration of the price provisions in the licenses.

It has been traditional among the cutout manufacturers to price the great variety of different types of cutouts in accordance with classifications long in vogue within the industry. These classifications are made on the basis of voltage, current carrying capacity, rupturing capacity, etc.—standards which are of particular value to the users of these devices. Line did no more than accumulate data which would permit it to classify the various devices of the licensees in accordance with established practice, and then publicize its prices for the devices in the same classification. Disputes necessarily arose as to the appropriate classification of a particular device, and frequently specific information was needed to permit proper classification. The exchange of such data between Line and each of its licensees, however, was, as the District Court found, not for the purpose of price-fixing, but purely to assure fair treatment as between licensees and to give Line, the licensor, the information it needed properly to exercise its patent rights.

The license agreements provided for establishment of minimum prices by the licensor for products sold by licensee if made under the claims of the licensed patents and "comparable in respect to general type and purpose, ampere and voltage rating, and rupturing capacity" to licensor's products (*e.g.*, Railway's license, Ex. 150, R. 991, at 995). However, in the original schedule of Line's devices attached to the licenses, including Railway's, the data as to general type and purpose was meager; the schedule consisted merely of data taken off Line's price lists and contained no information as to rupturing capacity (R. 196). It was therefore difficult for a licensee to determine the minimum prices it was to follow. Accordingly, Railway wrote Line (Ex. 163, R. 1021; R. 232-3), requesting a conference for the purpose of clarifying the schedule.

Line recognized that the suggestion was appropriate (Ex. 171, R. 1037), and in preparation for the proposed conference to be held on September 4, 1940, it wrote the licensees and some of the prospective licensees requesting the submission by August 30 of catalogue data with which to make a classification of the products of the licensees equivalent to its own listed devices (Exs. 181-187, R. 1053-7; R. 288). The material was not sent in as promptly as was requested and in some instances was not sent in at all (R. 228; Exs. 188-195, R. 1057-105; Exs. 198-199, R. 1108-9), with the result that Line was unable to complete the work of classifying the material before the September 4 meeting (R. 228).

Because of the lack of essential data the meeting of September 4 lasted only a couple of hours and was devoted entirely to an explanation by Line of the reasons for some of the classifications and a discussion of a few specific dis-

crepancies in classification (R. 227-8, 311-2, 383, 483). Matthews, for instance, left the meeting without any idea as to where its devices properly belonged in the different classifications (R. 385). Prices were not discussed at the meeting (FF 28, R. 512; R. 408, 385).

The information necessary to classify the various cutouts requested by Line was not all received until the fall of 1940 and the real work of classification by Line did not take place until long after the September 4 meeting and after that information was received and compiled (R. 412). Thereafter Line prepared and sent to each individual licensee a schedule classifying the licensed cutouts manufactured by that licensee and showing Line's prices for comparable devices (R. 228-30, 360, 384). These schedules, effective January 18, 1941, were made up by Line independently (R. 228-30, 360).

From time to time various licensees individually made protests concerning the schedule, but always directly to Line. Where Line had made a mistake it corrected it, but otherwise declined to yield to the protests (R. 257, 260-72, 274-84, 312-4, 385-91). Further, Line did not send to any licensee any classification proposed for any other licensee (R. 384). Until at the Government's request Exhibit 400 (R. 1766) was prepared, no such data was ever available to the licensees (R. 247).

Line received requests to exempt from price control commitments made by the licensees prior to the receipt of the schedule. Line thereupon called a meeting for January, 1941, to deal with those questions. There was no discussion at that meeting of any price or prices to be established by Line for cutouts, and the prices listed on the schedules were Line's own selling prices, determined solely by Line without

discussion with or advice from any of the appellees (FF 28, R. 512; R. 393-5, 422, 436, 482-3).

Against the full weight of this consistent and substantial proof and the findings made thereon, the Government has little to offer. Following the same technique used in the Court below, it has taken isolated phrases from scattered documents and given them distorted and undue emphasis. In the main, these excerpts indicate the concern of individual licensees over competitive inequality which would result if they were subjected to licenses with price clauses while others were allowed to continue infringing free from price control or the obligation to pay royalties. This anxiety was prompted by sound business considerations and does not reflect the existence of any concerted plan to fix prices.

Any prospective licensee, would naturally feel aggrieved if it accepted price restrictions in its license and then observed some of its infringing competitors still free of such restriction and of royalty obligation. Each prospective licensee, whether it liked it or not, no doubt recognized that a degree of price stability would ensue if all infringers accepted licenses with price provisions. Each prospective licensee was at great pains to avoid taking a license which was less favorable than licenses to others.

Doubtless, the licensor seeking to exploit the patents sought to convince the licensees that the proposed price restrictions would not put licensees at a competitive disadvantage. It would be as unrealistic and unreasonable to expect not to find some expression of such matters in the documents as it is to suggest that their having been

mentioned demonstrates the existence of a conspiracy to fix prices.

The escrow agreement is a case in point. The Government urges, as it did below, that certain licensees by objecting to their licenses becoming operative before others completed negotiation for their licenses were in fact effectuating a concerted price-fixing plan. Actually, the escrow arrangement simply gave the licensees the option to take or reject the license for a further period of time while it protected them from a competitive disadvantage. Indeed, the escrow arrangement negatives the suggestion of any conspiracy, for if one had existed, the protection of the escrow arrangement was wholly unnecessary.

The Government has brought forward no new facts or theory and the reasoned determinations of the District Court below should be sustained.

D. The Masonite Case is not in point.

The Government places considerable reliance on the *Masonite* case,[1] contending that under the principles there

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[1] *United States* v. *Masonite Corporation*, 316 U. S. 265 (1942).

applied by this Court the *General Electric* case is in any event not applicable to the licensing here under consideration.

The *Masonite* case is not in point. Masonite eliminated competition by entering into what were denominated "agency" and "del credere factor" agreements with its competitors. The competitors agreed to act as Masonite's agents in the sale of board manufactured by Masonite and to sell only at prices fixed by Masonite for its agents. These competing manufacturers, some of whom owned competing patents and had been manufacturing hardboard in competition with Masonite, ceased completely their manufacture of hardboard and agreed to promote the sale of Masonite hardboard rather than their own materials. After analyzing the particular facts of the case, this Court noted that Masonite had sought and assured itself of the dominant manufacturing position in the industry and obtained the use of the sales departments of its competitors with a guaranty of payment for the goods sold, and thereby in effect had eliminated competition by an agreement with its competitors fixing resale prices.

Under these facts we have no quarrel with the conclusion of the Court that there had been such a disposition of the article that it might fairly be said the patentee had received his reward for the use of the article when it in effect sold to competitors, and that Masonite, the patentee, had exhausted its limited patent privilege when it disposed of the products to the competitor *del credere* agents.

In the present case, the District Court below considered the *Masonite* case and emphasized the distinction between the facts in that case and this in the following cogent terms:

> "Of course agreements which fix resale prices for goods in interstate commerce are *per se* an illegal restraint of trade because after the transfer the patented product is free from the patent monopoly, but this is not true as to the first sale of products made and sold under a patent license. Here the patentee had not exhausted his limited privilege."[1]

The District Court's distinction finds support in the opinion of this Court in the *Masonite* case, where it is stated that this Court in no way purported to pass upon the legality of patent licenses to manufacture and sell. This Court said at page 277:

> "We do not have here any question as to the validity of a license to manufacture and sell, . . . Hence we need not reach the problems presented by *Bement* v. *National Harrow Co.*, 186 U. S. 70, and that part of the *General Electric* case which dealt with the license to Westinghouse Company."

In spite of such explicit language, the Government undertakes to strengthen its argument by emphasizing similarities in the facts and defenses presented in the *Masonite* case and this case, without noting significant and controlling differences. This is an old device frequently employed, particularly in antitrust suits, where a certain degree of factual similarity can always be found. We feel that no purpose will be served by discussing the degree of similarity in the factual situation since there are certain vital differences in this case. We are here concerned not with any scheme or plan to fix prices among competitors but solely with a lawful licensing of patents and the imposi-

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[1]Op., R. 495.

tion of limitations in the license long recognized as lawful. The restrictions were clearly confined to the scope of the patent grant; the parties acted independently; and the licenses were necessary to enable lawful competition, for the commercially acceptable device could not be manufactured by and sold without the licenses.

Line, in this case, did not adopt any scheme or plan for fixing prices which in the slightest degree diverged from that which it could lawfully do through the specific licensing of its patent. It did not tie its competitors into an arrangement to push the sales of the patented device, nor did it require them to abandon the sale of independently patented devices. As the evidence shows and the Court found, the competitors did develop and further the sale of independently patented products and there was no restriction upon their so doing. Indeed, their sales of the patented device represented less than half of their total sales of cutouts. Furthermore, Line granted in this case licenses to make, use and sell. These licenses were lawful licenses, and the licenses were required to enable the competitors to continue their business. Here, again, the distinction from the *Masonite* case is clear, for in that case there was no showing that the *del credere* relationship was necessary under any of the business facts, which there existed, in order to permit the continuation of Masonite's competitors in the field.

Finally, the price limitations contained in Line's licenses to its competitors were limitations which this Court and other courts have for many years recognized as appropriate and necessary to the patentee as a lawful means of securing a reward for his invention. The District Court found that Line's licensing was done to secure such reward. Unlike

the *Masonite* case, Line did not in any way enter into agreements wth its competitors in a manner which enhanced the value of its own trade position by impairing or eliminating competition, for without the licenses the competition could not have continued. Line was engaged in the manufacture of the patented devices and it simply undertook to assure that its competitors would not undermine its own sales of the patented device by unduly low prices which at the same time would adversely affect the royalty income from the practice of its invention by the licensees to which it also was lawfully entitled.

It is evident that the Government's argument comes down to this—that all multiple licenses are unlawful under the Sherman Act. The fact that the Government qualifies its conclusion by the condition that, in order to be unlawful, such licensing must be undertaken under circumstances where each licensee is aware of the fact that others are being licensed on similar terms, does not actually limit the broad sweep of the argument. It is absurd to suppose that such knowledge will not exist in every multiple licensing situation. Business necessity demands that a manufacturer acquaint himself with such data and take it into account to ensure fairness of treatment and the preservation of his competitive position. Thus, the Government's argument that such awareness justifies the inference that an illegal agreement exists is, in the last analysis, an argument that multiple licensing, standing alone, operates to make conspirators of all who grant or take such a license.

Certainly multiple licensing such as is involved in this case was beneficial to the public in that it permitted competition which would not otherwise have existed. It is not to be expected that the relatively small licensors, Line and

Southern, could themselves have satisfied the demand for the patented device.

Any decision of this Court which leads to the conclusion that inventions protected by valid patents may not be shared with competitors under reasonable and lawful terms and conditions, including price limitations, will result in fewer patent owners being willing to grant licenses.

II

THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE GRANTING AND ACCEPTANCE OF LICENSES WITH PRICE LIMITATIONS DID NOT VIOLATE SECTION 1 OF THE SHERMAN ACT.

The District Court found that there were no agreements or understandings, express or implied, between appellees, other than those embodied in the separate written cross-licenses and license agreements involved in this case. As a matter of law, the Government argues that even in the face of these findings of the District Court, the various cross-licenses and license agreements are unlawful because the doctrine of the *Bement*[1] and *General Electric*[2] cases is unsound and should be overruled[3] and that, in any event, that doctrine contains various limitations which make it inapplicable to this case. The fundamental question of law thus presented is simply whether the limitation of a license to sales at designated minimum prices of licensed products covered by valid patents is illegal *per se* under the Sherman Act.

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[1]*Bement* v. *National Harrow Company*, 186 U. S. 70 (1902).

[2]*United States* v. *General Electric Company, et al.*, 272 U. S. 476 (1926).

[3]This is the most recent of a number of attempts by the Government to secure the reversal of the *General Electric* case, *e.g.*, see its briefs in *United States* v. *Masonite Corporation, et al.*, 316 U. S. 265 (1942), and in *United States* v. *Univis Lens Company, et al.*, 316 U. S. 241 (1942), and compare its briefs in *General Talking Pictures Corporation* v. *Western Electric Co., et al.*, 304 U. S. 175 (1938), reh. granted, 304 U. S. 587 (1938), 305 U. S. 124 (1938), reh. den., 305 U. S. 675 (1939).

A. A patentee may lawfully limit a license under valid patents to products covered thereby which are sold at prices not lower than those specified by the licensor.

1. THROUGHOUT THE LIFE OF THE SHERMAN ACT THE CASES HAVE SO HELD IN AN UNBROKEN LINE OF DECISIONS.

Nearly half a century ago this Court, in the *Bement* case, first held that it was lawful under the Sherman Act for a patentee to limit a license under valid patents to products covered thereby which are sold at prices not lower than those specified by the licensor. So firmly established is this doctrine that in the intervening years, during which this question has periodically and frequently been presented, neither this nor any other Court has held to the contrary.

The *Bement* case was referred to with approval in the *Bobbs-Merrill*,[1] *Dr. Miles*[2] and *Standard Sanitary*[3] cases. Again presented directly with the question in 1926, in the *General Electric*[4] case, this Court reaffirmed the doctrine of the *Bement* case in the strongest language. Since 1926, the *General Electric* case has been referred to by this Court with approval in, among others, the *Carbice*,[5] *General Talk-*

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[1] *Bobbs-Merrill Company* v. *Strauss, et al.*, 210 U. S. 339, 345 (1908).

[2] *Dr. Miles Medical Company* v. *John D. Park & Sons Company*, 220 U. S. 373, 401 (1911).

[3] *Standard Sanitary Manufacturing Company* v. *United States*, 226 U. S. 20, 39-40 (1912).

[4] *United States* v. *General Electric Company, et al.*, 272 U. S. 476 (1926).

[5] *Carbice Corporation of America* v. *American Patents Development Corporation and Dry Ice Corporation of America*, 283 U. S. 27, 31 (1931).

ing Pictures,[1] *Interstate Circuit*,[2] and *Ethyl*[3] cases and received concrete application in the *Hartford-Empire*[4] case. The doctrine, as broadly stated by Chief Justice Stone in the *Ethyl* case, is that:

> "He [the patentee] may grant licenses to make, use or vend, restricted in point of space or time, or with any other restriction upon the exercise of the granted privilege, save only that by attaching a condition to his license he may not enlarge his monopoly and thus acquire some other which the statute and the patent together did not give" (309 U. S. 436 at 456).

In this very term of court, Mr. Justice Frankfurter stated in his dissenting opinion in *MacGregor* v. *Westinghouse Electric and Manufacturing Company*:

> "It is not questioned that a price-fixing clause in a license to manufacture under a valid patent falls outside the interdict of the anti-trust acts . . . The power to fix the price of patented articles is part of the patent grant. It is a mode of maintaining the integrity of a patent and as such is sanctioned by public policy."[5]

Moreover, it would seem that this premise must in fact have been accepted by the majority in this and the companion

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[1] *General Talking Pictures Corporation* v. *Western Electric Co., et al.*, 305 U. S. 124, 127 (1938).

[2] *Interstate Circuit, Inc., et al.* v. *United States*, 306 U. S. 208, 228 (1939).

[3] *Ethyl Gasoline Corporation, et al.* v. *United States*, 309 U. S. 436, 456 (1940).

[4] *Hartford-Empire Co., et al.* v. *United States*, 323 U. S. 386, 424 (1945).

[5] 67 S. Ct. 424, 426 (1947).

case, *Edward Katzinger Company* v. *Chicago Metallic Manufacturing Company*, for if it had not been, the entire inquiry into the validity of the patents was wholly unnecessary. Indeed, Mr. Justice Black, writing for the majority in the latter case, stated:

> "The *Sola* case reaffirmed past decisions holding that price-fixing agreements such as those here involved are unenforceable because of violations of the Sherman Act, 15 U. S. C. A. §§ 1-7, 15 note, save as they may be within the protection of a lawful patent."[1]

Similarly, the lower federal courts and the state courts have many times sustained the right of a patent owner to grant licenses with minimum price provisions.[2] The same rule prevails in England.[3]

[1] 67 S. Ct. 416, 419 (1947).

[2] *Straight Side Basket Corporation* v. *Webster Basket Co., Inc.*, 82 F. (2d) 245 (C. C. A. 2nd, 1936); *Goshen Rubber Works* v. *Single Tube Automobile & Bicycle Tire Co.*, 166 Fed. 431 (C. C. A. 7th, 1908); *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 154 Fed. 358 (C. C. A. 7th, 1907); *Indiana Mfg. Co.* v. *J. I. Case Threshing Mach. Co.*, 154 Fed. 365 (C. C. A. 7th, 1907); *United States* v. *United States Gypsum Co., et al.*, 67 F. Supp. 397 (D. C. 1946); *United States* v. *Rohm & Haas, et al.*, unreported charge of Judge Meaney to the jury (D. N. J. 1945); *United States* v. *Parker-Rust-Proof Co., et al.*, 61 F. Supp. 805 (E. D. Mich. 1945); *United States* v. *Wayne Pump Co., et al.*, 44 F. Supp. 949 (N. D. Ill. 1942); *General Electric Co., et al.* v. *Willey's Carbide Tool Co., et al.*, 33 F. Supp. 969 (E. D. Mich. 1940); *Ceramic Process Co., et al.* v. *Cincinnati Advertising Products Co.*, 28 F. Supp. 794 (S. D. Oh. 1939); *Casco Products Corporation* v. *Kenny*, 24 U. S. P. Q. 171 (S. D. N. Y. 1935); *American Lead Pencil Co.* v. *Musgrave Pencil Co., Inc., et al.*, 170 Tenn. 60, 91 S. W. (2d) 573 (1936); *Massie, et al.* v. *Asbestos Brake Co., et al.*, 123 Atl. 155 (N. J. Ch. 1922); see *United States* v. *Aluminum Co. of America, et al.*, 148 F. (2d) 416, 438 (C. C. A. 2nd, 1945).

[3] TERRELL ON PATENTS (8 ed.) p. 271.

2. The Doctrine of the General Electric Case Is In Accord With Fundamental Legal and Economic Principles Underlying the Patent Law.

The Government's basic premise is that a patent "confers" what it describes as "monopoly rights" in "derogation of the policy of equal opportunity and freedom of trade". The purpose of that exercise in applied semantics appears to be to link patents with the monopolies created by the Crown before the Statute of Monopolies in 1623 restricting the practice of some established industry or business to a selected group.

But, although often spoken of as a monopoly, the right of exclusion under a patent is very different from the monopoly which was invalid at common law, and the propriety of patents granted for inventions was always recognized, both at common law and under the Statute of Monopolies.

That difference was recognized by the Constitution, which provides that "The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries" (Art. I, Sec. 8). Acting in accordance with that constitutional grant of power (and in accordance with the constitutional suggestion of how to promote progress by providing a reward for it) Congress enacted the Patent Statutes. The basic provision of these statutes provides: "Every patent shall contain . . . a grant to the patentee, his heirs or assigns, for the term of seventeen years, of the exclusive right to make, use and vend the invention or discovery."[1]

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[1]R. S. § 4884, 35 U. S. C. Sec. 40.

The patent grant does not give to the patentee the right to use the invention, but only the right to exclude others from using it, as was stated by Chief Justice Stone in *Special Equipment Co.* v. *Coe.*[1] The Court said that the nature of a patent was "the 'exclusive right to make, use, and vend' the invention, and *this includes the exclusive right to license others* to make, use and vend it." And the Court further stated in that case that "the grant is nothing more than a means of preventing others, *except under license from the patentee*, from appropriating his invention." (Italics supplied).

The award of that exclusive right was designed (1) to serve as an incentive to the research which produces inventions, (2) to encourage full public disclosure of inventions when made, and (3) to provide the protection needed to induce men to undertake the risk and expense of putting new inventions on the market.[2]

As this Court has frequently recognized:

> "An inventor deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge."[3]

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[1]324 U. S. 370, 378 (1945).

[2]Patent Commissioner Coe pointed out the importance of the last factor when testifying in the T. N. E. C. hearings:

> "I think I can present to you indisputable evidence that speculative capital will not back new inventions without the patent protection. And in the final analysis this is the crux and the most important thing in the whole patent question" (Part III, p. 858).

[3]*United States* v. *Dubilier Condenser Corp.*, 289 U. S. 178, 186 (1933).

Furthermore, if an invention be of the character which permits the inventor "to keep his invention secret and reap its fruits indefinitely", *United States* v. *Dubilier Condenser Corp.*, *supra*, p. 186, the right of exclusion, limited to 17 years, may well be less than the rights which the inventor already possesses.

A patent does not, therefore, in any case restrain trade or competition in anything. Before the invention, there was no trade or commerce in the invention because it did not exist. After the invention, the issuance of a patent merely makes it possible for the inventor to disclose and make public use of his invention and still retain for a limited period the right of exclusion which, if no disclosure had been made, would have continued until the invention had been made by someone else, which might or might not occur within 17 years.

The foregoing discussion points up a second basic fallacy in the Government's argument. Patents are not, as the Government assumes, issued solely to encourage the making of inventions. One of the principal purposes is to encourage disclosure of inventions and to limit to 17 years the "monopoly" which is potential in the sole possession by an individual of information with respect to a new process or article of manufacture. Issued patents constitute one of the most important, if not the most important, sources of information with respect to technological advances. Invention begets invention, and the promotion of "the progress of science and useful arts" is dependent not only upon stimulating invention by assuring the inventor of rights in his own creation but also, in the larger measure, by giving the inventor an incentive to disclose his contribution so that knowledge of it may become immediately available and, at

the end of 17 years, free use of it may be assured to the public.[1]

This rather elementary analysis, made necessary by the Government's distortion of fundamental concepts, leads to consideration of the nature of a patent license and the effect of a limitation upon that license. Since, by statute, the patent owner has the legal power to exclude all others from the use of his invention—through the medium of a suit for infringement, to enjoin others from reaping where they have not sown—the only effect of a license is a waiver of that right as to that licensee. Trade in the invention, confined to the patentee by secrecy before his disclosure and by the patent for 17 years thereafter, is opened to the licensee.

The patent owner is under no compulsion to grant licenses and may choose to keep for himself the exclusive rights granted. But what if he grants licenses which are limited, either as to territory, product, time or price? What if the patentee waives his rights only to a limited extent? Is any restraint imposed upon trade or commerce by the limitation? A limitation of a license to sales in an area or for a limited period of time is merely a definition of the scope of the waiver by the patentee of his right to sue for infringement and the licensee is just as free as he was before acceptance of the license to sell in areas, or at times other than those covered by the license. The only risk which he runs in making those unlicensed sales is an infringement suit, a hazard which existed as to all sales before the granting

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[1] *Cf.* the patent granted in 1421 by Republic of Florence to Filippo Brunelleschi to encourage him to "open up what he is hiding" in order "that this matter [a new type of boat] so withheld and hidden without fruit, shall be brought to the light, to be of profit to said Filippo and to our whole country and others" 28 J. P. O. S. 109 (1946).

of the license and which is unaffected by the license, there being no estoppel to attack the patent outside the scope of the license. Such limitations in licenses have been consistently sustained for years.

A license containing a price limitation is in no wise different, and the cases sustaining price limitations have recognized this. A license containing a price limitation is merely an assurance that the patentee will not enforce his legal right to sue the licensee for infringement when sales are made at licensed prices and a reservation of that existing right with respect to sales at lower prices.

Against that background the propriety of a license limited with respect to price is clear. The limitation of the license leaves both patentee and licensee in precisely the same positions as they were before the grant of the license, save that the licensee is freed from threat of patent infringement suits in a defined area; there is no "restraint of trade" which is not derived wholly and lawfully from the patent. There is no "condition", "agreement" or "consideration" which expands the monopoly of the patent beyond the precise scope of its claims, no restraint or monopolization of unpatented parts or materials, no restriction upon the freedom of the licensee which did not exist before the execution of the license. There is, therefore, no agreement which can restrain trade or commerce within the prohibition of Section 1 of the Sherman Act.

In addition to the legal and logical arguments for sustaining the validity of a limited license, there are important social and economic considerations which, although more properly a subject for legislative inquiry, should not be overlooked.

A patentee whose primary interest lies in manufacturing and selling his invention should not be compelled to

choose between refusing to grant licenses and running the risk of having his business destroyed by those whom he permits to enter that business. The public interest is not served by forcing a small patentee, such as Line, to deny licenses to other manufacturers whose output is necessary to supply the demand. Royalties are clearly not "automatic price protection", as the Government contends, for costs of production and margins of profit vary, not only among different manufacturers but also from time to time with the same manufacturer. Even if the costs and profit margin of each prospective licensee could be ascertained and stabilized, the attempt to obtain price protection by varying royalties would lead to discriminations, prohibitive royalties and difficulties which would be insoluble. In order to encourage licensing of patents and thus increase competition, it is necessary to allow a patentee to protect his own business from the price competition of those who may be more favorably situated from the viewpoint of costs.

The Government is correct in its statement that a patent is not intended to guarantee a financial return to the patentee. But if a patent offered no prospect of profit, it would lose most, if not all, of its value as an incentive for invention. The assurance to an inventor of the right to license others without running the risk of having his manufacturing profits destroyed by the competition which his licenses have made possible "maintains the integrity of his patent" by permitting him to derive profit from both normal and intended methods of exploiting it: making, using and vending under it and granting licenses.

3. The Doctrine of the General Electric Case Is Consistent With Other Decisions By This Court.

That the law is, and throughout the long life of the antitrust laws has been, as stated in the *General Electric* case is not, and in good conscience could not be, denied by the Government. However, the Government contends that the law as thus settled is wrong and is in effect a remnant of the doctrine of the *Dick*[1] and *Button-Fastener*[2] cases, which were later overruled in the *Motion Picture Patents* case.[3]

The doctrine of the *Bement* and *General Electric* cases is not, however, founded on the *rationale* of the *Dick* and *Button-Fastener* cases and is as sound now as when it was first established.

In the first place, as a matter of chronological sequence of decision, although the *Bement* case and a few of the other cases cited above preceded the *Motion Picture Patents* case, the *General Electric* case and the majority of cases cited above not only came long after the *Motion Picture Patents* case, but also at a time when the implications of the latter case were thoroughly understood. In the *General Electric* case, appellant, precisely as it is doing here, argued strongly that the *Bement* case should not be followed because the latter case cited the *Button-Fastener* case in support. This Court pointed out that the overruling of the *Dick* case and the disapproval of the *Button-Fastener* case by the *Motion Picture Patents* case did not

[1] *Henry* v. *A. B. Dick Company*, 224 U. S. 1 (1912).

[2] *Peninsular Button-Fastener Co.* v. *Eureka Specialty Co., et al.*, 77 Fed. 288 (C. C. A. 6th, 1896).

[3] *Motion Picture Patents Company* v. *Universal Film Manufacturing Company, et al.*, 243 U. S. 502 (1917).

carry with it the overruling of the *Bement* case, because the *rationale* of the *Button-Fastener* case went far beyond what was necessary to sustain the actual holding of the *Bement* case.[1] Moreover, the *General Electric* case has since been cited with approval by this Court, and the general principle for which it stands has been relied on, in many of the principal cases (indeed, most of the very cases relied on by the Government as being inconsistent with the *Bement* and *General Electric* cases) in which the Court was working out the implications of the *Motion Picture Patents* case and at the same time interring the rulings and reasoning of the *Dick* and *Button-Fastener* cases.[2]

In this connection, it is interesting to note that among the justices who participated in the unanimous decision of the *General Electric* case were Justices Brandeis and Stone, both of whom were always alert to prevent any abuse of patent rights.

In the second place, the *rationale* of the *General Electric* case is distinct and quite different from that of the *Dick* and *Button-Fastener* cases.

The reasoning of the latter cases was essentially the same as that expressed by Mr. Justice Holmes in his dissenting opinion in the *Motion Picture Patents*[3] case—*i.e.*, that, since a patentee has complete power to exclude others from using, manufacturing or selling the subject of his

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[1]*United States* v. *General Electric Company, et al.*, 272 U. S. 476, 493 (1926).

[2]*Carbice Corporation of America* v. *American Patents Development Corporation and Dry Ice Corporation of America*, 283 U. S. 27, 31 (1931); *Interstate Circuit, Inc., et al.* v. *United States*, 306 U. S. 208, 228 (1939); *Ethyl Gasoline Corporation, et al.* v. *United States*, 309 U. S. 436, 456 (1940).

[3]*Motion Picture Patents Company* v. *Universal Film Manufacturing Company, et al.*, 243 U. S. 502, 519-20 (1917).

patent, he has what Mr. Justice Holmes regarded as the lesser right of licensing the patent on substantially any condition he sees fit, including a condition which would arrogate to him a monopoly of products not covered by his patent, whether or not reasonably related to the exploitation of the monopoly granted him by his patent.

The fallacy in this reasoning was not repeated in the *General Electric* case, which proceeded on the theory that a patentee may license

> "upon any condition the performance of which is reasonably within the reward which the patentee by the grant of the patent is entitled to secure" (272 U. S. at p. 489),

a principle which has been the guide-post in all succeeding patent cases. That this reasoning is different from, and is not a remnant of, that of the *Dick* and *Button-Fastener* cases is obvious. The test is, not whether the license restriction is convenient or profitable to the patentee, wholly without regard to whether the patentee is profiting from or restraining trade in products not covered by his patent, but whether it is "reasonably" adapted to the securing of pecuniary reward from the patent and limited, as restated in the *Ethyl* case, by the further condition that it

> "may not enlarge his monopoly and thus acquire some other which the statute and the patent together did not give" (309 U. S. at p. 456).

In the *General Electric* case, having set forth its guiding principle, this Court then proceeded to apply it to the license restriction before it, as follows:

> "If the patentee goes further and licenses the selling of the articles, may he limit the selling by limit-

> ing the method of sale and the price? We think he may do so provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly. One of the valuable elements of the exclusive right of a patentee is to acquire profit by the price at which the article is sold. The higher the price, the greater the profit, unless it is prohibitory. When the patentee licenses another to make and vend and retains the right to continue to make and vend on his own account, the price at which his licensee will sell will necessarily affect the price at which he can sell his own patented goods. It would seem entirely reasonable that he should say to the licensee, 'Yes, you may make and sell articles under my patent but not so as to destroy the profit that I wish to obtain by making them and selling them myself' " (272 U. S. at p. 490).

The cases cited by the Government, the *Motion Picture*,[1] *Carbice*,[2] *Masonite*,[3] *B. B. Chemical*[4] and *Mercoid*[5] cases, are not at odds with this *rationale*. The test explicitly laid down in the *General Electric* case is whether the conditions are "normally and *reasonably* adapted to secure pecuniary reward for the *patentee's monopoly*", and the license conditions sanctioned are those which "necessarily affect the price at which the patentee can sell his own

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[1] *Motion Picture Patents Company* v. *Universal Film Manufacturing Company et al.*, 243 U. S. 502 (1917).

[2] *Carbice Corporation of America* v. *American Patents Development Corporation and Dry Ice Corporation of America*, 283 U. S. 27 (1931).

[3] *United States* v. *Masonite Corporation et al.*, 316 U. S. 265 (1942).

[4] *B. B. Chemical Co.* v. *Ellis et al.*, 314 U. S. 495 (1942).

[5] *Mercoid Corporation* v. *Mid-Continent Investment Co. et al.*, 320 U. S. 661 (1944).

patented goods". Obviously the facts in the cases cited by the Government, and the Government's suppositious licenses conditioned on the transfer to the patentee of stolen goods, lottery tickets, counterfeit money, etc., do not satisfy this test. Those conditions are clearly designed to secure to the patentee a measure of monopoly in something other than the patented product, not in the patented product itself, and they bear no relation whatsoever to the product to which he is by law entitled to a monopoly, nor do they aid him in the enjoyment of that monopoly. Those license conditions are purely adventitious.

The Government goes beyond the holdings of the above mentioned cases, however, and takes the broad position that the only rights which a patentee has in licensing others under his patent which are immune from the Sherman Act are the right to exclude and the right to charge royalties. It then concludes that the doctrine of the *General Electric* case is unique, contrary to this principle, and should, therefore, be reversed. On analysis this position is untenable. Like the Government's argument with respect to the *Button-Fastener* case, this argument, too, was made by the Government in its argument in the *General Electric* case.

The price provisions of the licenses in this case are not contractual obligations in the sense that if a licensee sold the licensed devices below the minimum prices there would be a breach of contract. The price provisions are merely limitations on the grant. This is not a mere matter of semantics, but a matter of substance, affecting the remedies available to the licensor on breach of the condition. The limited licenses are merely waivers of the licensor's right of exclusion. The price condition relates to the very subject matter of the patents, not to products not covered

by the patents. The price condition is thus no different in kind than limitations as to quantity, kind, the duration of the license, quality, size, territory, etc. Limitations having a more direct bearing on price than quantity, territorial and royalty limitations are difficult to imagine. The Government concedes that such limitations are lawful under the decisions of this Court.

4. LEGISLATIVE HISTORY DEMONSTRATES THAT CONGRESS INTENDED AND CONTINUES TO INTEND THAT PATENT LICENSES WITH PRICE LIMITATIONS ARE LAWFUL UNDER THE SHERMAN ACT.

When the question was presented in the *Bement* case as to whether the Sherman Act made illegal the fixing of the licensee's prices by the licensor, this Court understandably considered the intent of Congress and concluded

> "that statute clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor. Such a construction of the Act we have no doubt was never contemplated by its framers" (186 U. S. at p. 92).

The Court, in support of this conclusion, might have referred to the statement in the Senate by Senator Sherman, the Act's sponsor:

> "It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination. . . . A limited monopoly secured by a

patent right, is an admitted exception, for this is the only way by which an inventor can be paid for his invention" (21 Cong. Rec. 2457 (1890)).

For many years bills have periodically been introduced in Congress to make patent licenses with price restrictions illegal, but all such proposals have been rejected by Congress.[1] Moreover, after hearings the Temporary National Economic Committee in its Final Report and Recommendations transmitted to Congress in 1941, recommended that the patent and antitrust laws be amended to require patentees to grant only unrestricted licenses.[2]

While this recommendation, which Congress did not see fit to follow, is cited to illustrate the extent to which the attention of Congress has been directed to the problem, it should not be inferred that the T. N. E. C.'s conclusions were unopposed by distinguished and well informed groups. This particular proposal has been disapproved by, among others, the Commissioner of Patents[3] and by the National Patent Planning Commission, appointed by President Franklin D. Roosevelt.[4]

Even in its attack upon the doctrine in the *General Electric* case the Government is obliged to recognize in its

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[1]*E.g.*, H. R. 22345, 62nd Cong., 2nd Sess. (1912); S. 2730, 77th Cong., 2nd Sess. (1942); S. 2491, 77th Cong., 2nd Sess. (1942), and Hearings thereon; H. R. 7713, 77th Cong., 2nd Sess. (1942); H. R. 1371, 78th Cong., 1st Sess. (1943).

[2]Final Report and Recommendations of the Temporary National Economic Committee, Sen. Doc. No. 35, 77th Cong., 1st Sess. (1941) 36-37.

[3]Hearings, T. N. E. C. 31-A at p. 18,473 *et seq.*

[4]H. Doc. No. 239, 78th Cong., 1st Sess. (1943) 9. The Commission, after extensive investigation, stated that the proposed reform "would not be a beneficial innovation in our patent system."

brief that patentees have proceeded in reliance upon the decision, and it cannot be doubted that a reversal of the doctrine at this time would require very substantial readjustments.

Moreover, while the Government's brief departs extensively from the record in the present case and even presents arguments based upon other cases now pending and which assume facts directly contrary to the facts in this case, it has presented no evidence as to what would be the effect of striking down the *General Electric* doctrine or as to the wisdom of such a course. How many articles of commerce will be affected? To what extent will prices increase or decrease as a result of such a decision? How many industries are significantly affected by price-fixing restrictions in patent licenses? How many such licenses are outstanding? What is the volume of articles sold subject to licenses containing price restrictions as opposed to other articles of trade and commerce? Would the invalidating of price limitations in patent licenses cause patent owners not to license others? Would it drive prospective patentees away from patenting their inventions and into using them as trade secrets? These and other broad economic questions may properly be raised in view of the Government's broad attack upon the *General Electric* doctrine. We submit that not only has the Government failed to provide answers to these and similar questions, but that they are pertinent and of a kind that the Congress, and not the Courts, are equipped to handle.

In the light of these facts, therefore, we respectfully submit that the doctrine of the *General Electric* case should stand unless and until the legislative branch of the Government determines it unwise as a matter of policy.[1] As has

[1] *Cf. Hartford-Empire Co., et al.* v. *United States*, 323 U. S. 386, 416-417 (1945).

been said by this Court in a similar connection in *Walling* v. *Halliburton Oil Well Cementing Company*, decided this term:

> "Finally, petitioner maintains that *Belo* was wrongly decided and that we should 'define the area of [its] continued vitality, if any.' His argument on this score is substantially the same as that advanced on behalf of the Administrator and considered by the Court in the *Belo* case itself.
>
> "The reasons stated in the *Belo* opinion for rejecting this argument are equally valid today, and need not be repeated. Moreover, our holding in *Belo* has been a rule of decision in this Court for five years, and recognized as such on each appropriate occasion. Knowing of the *Belo* decision, the Congress has permitted § 7(a) to stand unmodified and the courts have applied it as so construed. Employers and employees (including those involved in this case) have regulated their affairs on the faith of it. Even if we doubted the wisdom of the *Belo* decision as an original proposition, we should not be inclined to depart from it at this time."[1]

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[1]Slip op., p. 8.

B. The legality of the license agreements is not affected by the fact that they include licenses under three patents.

The Government contends that the licenses granted by Line are unlawful because they include rights under three patents—Lemmon, Schultz and Kyle—and are limited to devices sold at prices no more favorable than those followed by Line in its own sales of comparable devices. The Government characterizes this as an unlawful "combination of patents for price-fixing purposes".

The fallacy of the Government's argument in this respect is disclosed by its statement that "In the present case, the patentees combined for this purpose patents on different products held by different owners".

While the Lemmon and Schultz patents are held by different owners, they cover but one commercial product—*i.e.*, the improved device having the double hinge disclosed by the Lemmon and Schultz patents with the fuse link of Schultz—and the licenses under the Lemmon and Schultz patents are limited to that device. The power of Line to impose price limitations in respect of that device was complete by virtue of its Schultz patent, and the "combination" thereof with the complementary (non-competing) Lemmon patent added nothing to the monopoly theretofore held by Line.

As the trial court found, (FF 29, R. 513), "Line established minimum prices only for structures within the ambit of the claims of its own patents".

As has been seen, and as the Court found (FF 18, R. 508) Line's right to sublicense under Lemmon did not extend to *all* devices covered by Lemmon, but was limited to cutouts in which "the circuit interruption is caused by the thermally initiated rupturing of a current carrying ele-

ment in an expulsion tube" (Ex. 86, R. 786 at 788), *i.e.*, limited, as found by the Court (FF 18, R. 508), "to the commercially accepted device covered by Line's subservient patent", in other words devices covered by the Schultz patent. Similarly, the sublicenses granted by Line under the Lemmon patent were subject, as they had to be, to a like limitation (*e.g.*, Ex. 142, at R. 949).

Neither in the Line-Southern cross-license nor otherwise was there any agreement between Line and Southern with respect to whether prices were to be controlled by Line in its licenses to the other appellees (Ex. 86, R. 786; FF 32, R. 514).

In the light of the facts, it becomes apparent that the Government's argument is without factual basis. As to the Royal (Ex. 306, R. 1323), Johnson (Ex. 282, R. 1286), Westinghouse (Ex. 234, R. 1179), Schweitzer & Conrad (Ex. 229, R. 1134) and Porcelain (Ex. 209, R. 1120) licenses, and indeed Line's license to Southern, it cannot be said that Line was fixing prices under the Lemmon patent, because the Lemmon patent is not even mentioned in the price provisions. As to the other licenses granted by Line, prices were controlled only with respect to products coming within the claims of its own Schultz and Kyle patents. Thus, the Lemmon patent added nothing to the power of Line to control such prices.

The Government also suggests that Line imposed as a condition to the granting of any license under the Lemmon and Schultz patents that the licensee also take a license under the Kyle patent, and that such asserted action on the part of Line was unlawful.

The Kyle patent on cutouts enclosed in wet-process porcelain housings covered enclosed non-dropout as well as

dropout cutouts. But to the suggestion that, by reason of that fact, the inclusion of the Kyle patent in the licenses affected their validity, there are two complete answers:

(1) The Government has expressly limited its charge of unlawful price-fixing to "dropout fuse cutouts and their parts" (Answers to Interrogatories, R. 67-68); and

(2) Irrespective of such limitation of the issues, the monopoly of Line in both the dropout and the wet-process porcelain enclosed non-dropout fields was created, not by any combination of patents held by different owners, but by the fact that both the Kyle patent and the Schultz patent were issued by the Patent Office to the same person—Line.

Moreover, the Government's argument is founded on a factual misapprehension, *i.e.*, that licenses were offered under the dropout fuse cutout patents only if the licensee also took a license under Kyle. This simply is not so. As found by the District Court (FF 30, R. 513), Line neither required the licensees to take a license under, or to use, Kyle. Thus, Johnson (Ex. 282, R. 1286) and Royal (Ex. 306, R. 1323) each took licenses under the double hinge dropout patents alone.

What has apparently confused the Government is the fact, as found by the District Court (FF 30, R. 573), that Line did take the position that if a licensee who was infringing the Kyle housing patent desired a license to use the dropout fuse cutout patents in a dropout cutout which was ***also housed*** in wet-process porcelain, then Line required that a license also be taken under Line's Kyle patent. For

instance, in a letter to Matthews (Ex. 77, R. 762, 764), Line stated:

> "We do not intend to grant any licenses to make *housed* dropout fuses unless the proposed licensees accept a license under the wet process porcelain box patent. Refusal to accept a license under the wet process porcelain box patent will mean that *we will grant licenses only to make the open type dropouts*" (italics supplied).

And again the alternative was stated in a letter to General Electric (Ex. 93, R. 817, 818) enclosing the licenses actually executed by General Electric:

> "we are submitting the executed drop-out agreement relating to the patents 2,176,227 and 2,150,102 contingent upon the signing of the fuse box agreement by General Electric. Otherwise it will be necessary to revise the drop-out agreement to include in section 15 relating to non-assertion, an exception clause relative to any patents covering drop-out fuses which are housed."

What Line was afraid of was that an implied license would arise under Kyle by virtue of the grant of dropout cutout rights (*cf.* R. 310). That is to say, Line apprehended that it would find itself in the position of licensing a manufacturer under one patent with the knowledge that the manufacturer proposed, in exercising that license, to infringe another Line patent.[1]

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[1]While neither the Johnson nor the Royal cutout licenses were limited to non-enclosed cutouts, neither of them had ever manufactured any enclosed cutouts (Ex. 7, R. 601, 603). Hence, there was no danger of an implied license under Kyle arising from the grant of dropout cutout rights.

While a licensee under Kyle had the option to use the wet-process porcelain box, it was not required to do so. Thus, Westinghouse developed Prestite before it took its license, and completely abandoned use of the Kyle patent by 1944 (FF 23, R. 510-11). Its Prestite-enclosed cutouts were not subject either to the payment of royalties or to price limitations under the Kyle patent (R. 465-466).

It can scarcely be argued, therefore, that price control under Kyle resulted from "combining patents on different products", any more than it could be contended that in the *General Electric* case price control under the Just and Hanaman and Coolidge patents relating to tungsten filaments, and the Langmuir patent, relating to the use of gas in the bulb, had such a result. Moreover, since the Schultz patent covered dropout fuse cutouts, whether they were housed or not, and Line therefore had the right to and did limit its licenses with respect to prices on dropout fuse cutouts whether they were housed or not, such price limitation was unaffected by the inclusion in the license of the Kyle patent.

C. The Line-Southern cross-license is a lawful agreement.

Under the Line-Southern cross-license of 1940 Line was granted a license, and the right to sublicense others, under Southern's Lemmon patent, but only for cutouts in which "the circuit interruption is caused by the thermally initiated rupturing of a current carrying element in an expulsion tube", *i.e.*, the license and licensing right was limited to the improved device covered by Line's Schultz patent. Southern's license from Line was limited to its own use and did not embrace the right to sublicense others. Neither Line's license nor its right to license others under the Lemmon patent was subject to any price limitations. However, Southern's license to use was conditioned on Southern's maintaining minimum prices, as set by Line, with respect to any sale by Southern of a device covered by Line's licensed patents. Southern was to be relieved of this condition if Line should license others without requiring price limitations (Ex. 86, at R. 794-5).

The District Court found, among other things, that the cross-license was entered into in good faith, not for the purpose of fixing prices of cutouts, but to permit the manufacture and sale of the much less expensive device covered by the subservient Schultz patent, to facilitate the negotiating of licenses and to provide royalty income; that the inflexible intention to insist upon price control existed independently in Line and Southern prior to any discussions or arrangements between them, and that there was no agreement either express or implied between Line and Southern with respect to prices of cutouts other than that embodied in the written cross-license (FF 34, R. 514).

The Government does not challenge the validity of the cross-license insofar as it merely comprises an exchange

of manufacturing rights and provides a vehicle for the licensing of the patents of the parties. And, of course, the validity of an exchange of rights under non-competing patents has been universally sustained by this and other courts.[1] A contrary rule of law would, as Mr. Justice Brandeis had said,[2] result in the blocking of technical advancement, particularly where, as here, the patents are not only complementary to one another, but bear a dominant and subservient relationship.

Indeed, it is not clear that the Government complains at all of the cross-license. It seems clear, however, that if the Government does have any complaint it is restricted to the price-limitation provision. Apart from its belief that price-limitation of a license is wrong under any circumstances, the Government appears to believe that it is particularly odious in a cross-license.

A rational basis for this view is not presented. The only price-limitation in the cross-license is that with respect to Southern's manufacture and sale under Line's own patents. The cross-license did not in any respect increase Line's power over Southern's manufacture beyond that which Line would have had in any event by virtue of its patents even in the absence of an agreement.

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[1] *E.g., Standard Oil Company (Indiana) et al.* v. *United States*, 283 U. S. 163 (1931); *United States* v. *Aluminum Co. of America et al.*, 44 F. Supp. 97 (S. D. N. Y. 1941), rev. on other grounds, 148 F. (2d) 416 (C. C. A. 2nd, 1945); *Lynch* v. *Magnavox Co. et al.*, 11 F. Supp. 768 (S. D. Cal. 1935), rev. on other grounds, 94 F. (2d) 883 (C. C. A. 9th, 1938); *United States* v. *Motion Picture Patents Co. et al.*, 225 Fed. 800 (E. D. Pa. 1915), app. dism., 247 U. S. 524 (1918).

[2] *Standard Oil Company (Indiana) et al.* v. *United States*, 283 U. S. 163, 171 (1931).

Similarly, the cross-license invested Line with no additional control over those whom it licensed under its own and Southern's patents. Not only did the cross-license not compel Line to limit its licensee's prices,[1] but Line did not establish minimum selling prices for its licensees for any device not covered by a claim of its own patents (FF 29, R. 513). This power, too, Line had entirely by virtue of its own Schultz patent, for none of the licensed cutouts could have been manufactured or sold without infringing that patent.

The District Court found:

> "The cross-license agreements between Line and Southern were limited to the commercially practicable device covered by the subservient Schultz patent, and did not create additional power for price control of the licensed cutouts over that which each had before entering into the agreements." (FF 34, R. 514)

This case is entirely different from, and should be contrasted with, the cases in which cross-licensing and pooling of patents subject to price control were declared illegal, *viz*, the *Bathtub*,[2] *New Departure*,[3] *Blount*[4] and *Vehicular Parking*[5] cases. In contrast to the findings in this case, common

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[1]Indeed, the cross-license expressly envisaged the possibility that Line would not limit prices, for it provided that Southern was to be relieved of the price condition of its license if Line did not similarly limit any of its other licensees (Ex. 86, at R. 794-5).

[2]*Standard Sanitary Manufacturing Company et al.*, v. *United States*, 226 U. S. 20 (1912).

[3]*United States* v. *New Departure Mfg. Co. et al.*, 204 Fed. 107 (W. D. N. Y. 1913).

[4]*Blount Mfg. Co.* v. *Yale & Towne Mfg. Co.*, 166 Fed. 555 (C. C. D. Mass. 1909).

[5]*United States* v. *Vehicular Parking, Ltd., et al.*, 54 F. Supp. 828 (D. Del. 1944).

to all of these other cases was an unmistakable lack of good faith and a clear purpose to dominate an industry by the utilization of cross-licensing or patent pooling agreements as a mere device or blind. In addition, they all involved other facts of critical distinction.

In the *Bathtub* case, one Wayman, an individual, acquired the principal patent from Standard, which was already producing under it, and organized a combination of manufacturers and jobbers who entered into license agreements to observe prices to be fixed by a committee of the licensees both on original sales and resales. Eighty per cent of the license royalties were rebated if the licensees observed the terms of their licenses, the principal ones of which related to price-fixing the industry from top to bottom. In addition to the facts that the prices were fixed by agreement by a committee of licensees and that the royalty, like that in the *Vehicular Parking* case, *supra*, was designed only to secure price stabilization, it will be noted that Standard, which produced 50% of the products under the patent without being subject to dictation as to price before the organization of the scheme, submitted to having its prices fixed by a committee composed of its competitors after the scheme was in operation.

In the *New Departure* case, the indictment, the sufficiency of which was in issue, alleged that the parties "were separately owners of patents . . . differing from those held by the other corporation defendants", and that to effectuate their scheme to restrain trade "feigned the making of a license agreement". The Court interpreted the indictment as meaning that "None of the separate patent rights owned by the defendant corporations hinged or depended upon license rights transferred by the New Departure Manufacturing Company, and the right to manufacture

was not derived from it".[1] The license agreements, said the Court, were mere "subterfuges".[2]

In the *Blount* case, the Court pointed out that

> "The bill does not aver that the articles made by each company embody features covered by the patents of the other. While the contracts provide that the parties are licensed to use patented inventions of the other, this does not alter the fact that by the terms of the contracts each party is restrained in the exercise of its rights under its own patents, and in the sale of articles made solely under its own patents."[3]

Indeed, the Court went on to refer to the precise question involved in this case and concluded that

> "If, as a result of mutual licenses, there is put upon the market an article embodying the inventions of both patentees, so that as the effect of exchange of licenses a new article of commerce is developed, it is doubtful if the public is thereby unlawfully deprived of any of its rights or expectations of free competition."[4]

The *Vehicular Parking* case involved an obvious scheme to price-fix an industry by using patents as a mere device and subterfuge to accomplish that end. The defendants in that case pooled, in the literal sense, all their patents into a patent-holding company and took back licenses under the pooled patents, *including their own*, subject to onerous restrictions respecting prices and other conditions of sale, all for the avowed purpose of price-fixing the industry.

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[1] 204 Fed. at pp. 112, 113.
[2] 204 Fed. at p. 114.
[3] 166 Fed. at p. 557.
[4] *Id.*

The licenses provided that the licensees would pay the licensor patent-holding company a 4% royalty "in order to police the industry."[1] The patent-holding company did not itself manufacture the device, and the royalty exacted expressly to police the industry was the only compensation demanded by the licensor for the use of the patents.

In the face of these and other damaging facts the Court found that

> "The price fixing, then, is for the benefit of the licensees—not to protect Vehicular's sales of meters because Vehicular is not engaged in manufacturing and sale,"[2]

The Court further noted that:

> "Vehicular's income conditioned upon 4% royalty to compensate it to 'police' the industry. *Licensees' selling price with no relationship to Vehicular's (as patentee) reward.*" (Italics supplied)[3]

The cross-license agreement in the present case was entered into in good faith, its price limitation being based solely upon the legitimate purpose of protecting the patentee's business. It is thus in sharp contrast to the licensing arrangements involved in the foregoing cases, and is squarely within the doctrine of the *General Electric* case, which involved a similar cross-license subject to similar limitations.

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[1] 54 F. Supp. at p. 833.
[2] 54 F. Supp. at p. 838.
[3] 54 F. Supp. at p. 838, fn. 14.

D. Patent licenses with price limitations are equally lawful whether there be one or many licensees.

The Government contends that, even assuming that under the *General Electric* and *Bement* cases a patentee may lawfully limit the price at which his licensee may sell the licensed product, when more than one licensee is involved limited licenses somehow become unlawful. Beyond pointing to the fact that in those cases price-fixing of only a single licensee was actually involved, appellant has little to offer in support of its contention, except its general disapproval of the cases themselves. Its theory seems to be that, since, according to its views, the *General Electric* case is wrong, the scope of its doctrine should be limited to the precise factual situation then before this Court.

The only question properly presented is whether the *rationale* of the *General Electric* case requires or permits any different result when applied to a multiple, as distinguished from a single, licensee situation.

As has already been indicated, the *General Electric* case expressly recognized the right of a patentee to fix his licensees' prices as a means of exploiting his lawful monopoly. This right of a patentee is a right which is inherent in his ownership of the patent. He may exploit his patented invention by licensing one or licensing many. If he chooses to share his patent monopoly by licensing many, he in no way forfeits his right to profits through manufacture and royalties. Quite the contrary is the case, for through licensing many (a condition to be desired in terms of the Sherman Act), he is in greater need of price protection to assure return for the invention. The same considerations which led to the determination in the *General Electric* case apply, and there is in the rule of law which that case estab-

lishes no basis for distinguishing between a situation involving one of many licenses.

Moreover, the effect on the public at large of limited licenses in a multiple licensee situation is no different from where only one licensee is involved. As stated by Judge Stephens for the Statutory Court in the *Gypsum* case,

> "it would be an irrational fixation to construe the decision of the Court [in the *General Electric* case] as limiting licensing under price-fixing restrictions to one competitor, since the public is equally excluded *and equally subjected to the patentee's price* whether there is no licensee, one licensee or many."[1] (The italics are the Court's.)

The only additional effect on the public is an advantageous one. The granting of numerous licenses simply permits the public a greater choice of where to buy the patented article and result in additional competition in service, quality, etc.

Consider, in this connection, the alternatives confronting Line in view of the patent situation which existed. Line and Southern, could have refused to license other manufacturers and chosen to permit infringement to continue. This would have been tantamount to a dedication of the patents and the reward to Line and Southern as patent owners, which the patent laws contemplate, would have been lost.

Alternatively, Line and Southern individually could have brought infringement actions against all infringers. After a process of protracted, expensive and difficult litigation, the infringers would, under the facts of the case,

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[1] *United States* v. *United States Gypsum Co., et al.*, 67 F. Supp. 397, 431-2 (D. C. 1946).

including the unchallenged validity of the patents, have been ordered to cease manufacture. During the interim, however, neither Line nor Southern would have had the exclusive rights which the patents were intended to assure, and their energies and resources would have been dissipated in litigation. This procedure certainly would have carried no social benefits.

The only course which could reasonably have been followed was that of licensing infringers. But without some price protection in the licenses, Line and Southern could not reasonably be expected to have licensed their larger competitors.

Indeed, it is difficult to see how a small manufacturing patentee can obtain his legitimate reward in any multiple licensing situation without placing some restrictions upon price. Competitive manufacturers, by the very fact of licensing, are placed in a position to destroy the business of the patentee. Certainly in this case Line and Southern ran a substantial risk of losing considerable business to larger manufacturers such as General Electric and Westinghouse.[1] To measure the effect of this loss of business in royalties alone is impossible, and even if royalties were adequate, it is not consistent with the objectives of the patent law or the Sherman Act for the licensors to be limited to employing a licensing system which destroys their

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[1]Both Line and Southern, the patentees, are small companies. Many of their competitors are far larger. Southern's working capital was only $67,000, and its total average annual sales of all the products it made, including dropouts and everything else, were only $275,000 up to 1940 (R. 121). Its portion of sales of the patented devices has been less than 8% of the combined sales of licensed cutouts of all the appellees (Ex. W-23, R. 2322). Line, while larger than Southern, has, even while exercising price control, averaged only 25% of the total of the licensed cutouts sold by all appellees.

own opportunity to practice their own inventions. Some price protection is essential in any situation where small manufacturers are, by the exigencies of the situation, obliged to license larger and stronger competitors. That is the case which is presented here.

Consider other advantages which make licensing desirable. The licensing furthers the objectives of the patent laws and the Sherman Act. As the facts of this case show, it has stimulated new invention not only by placing an incentive upon the larger manufacturers to seek ways and means of avoiding the patents under which price restrictions were imposed, but also by permitting a number of manufacturers to enter a field of trade and commerce and participate in the development of the art. New inventions, some of which might be patentable, are more certain to ensue with many manufacturers participating. Moreover, the infringers, by being brought into the field of trade and commerce, are able to compete with each other in a number of ways, and such competition is more certain to be in the public interest than if the patent holders had confined the manufacture exclusively to themselves. And, finally, consistent with the entire underlying constitutional theory of the patent laws, upon the expiration of the patents, a large number of manufacturers will be fully acquainted with the invention and practicing it, a most salutary condition.

The Government argues, however, that price conditions in patent licenses may, if permitted to be extended to multiple licenses, lead to a complacent acceptance of price control. The Government's argument is bottomed primarily on the assumption that there is agreement among the licensees to take licenses which tends to prevent avoidance or testing of the patents which might otherwise occur.

However, in this case, as we have shown above, not only was there no agreement among the licensees to take licenses, but on the contrary they individually and collectively made every effort to find prior art to invalidate the licensed patents, and individually sought and are still seeking to avoid the patents and hence price control (in some instances with success). The facts in this case demonstrate that the purely à priori theory that prospective licensees will welcome price control, is just not true. Companies with the inherent competitive advantages of General Electric and Westinghouse did not, in fact, relish being dictated to by the relatively insignificant Line and Southern. Attempted price control simply stimulated, not weakened, their efforts to avoid or invalidate the patents.

The many courts to which have been presented cases involving situations where more than one license with price limitations had been granted, have unanimously sustained its legality.[1] Indeed, so well-established is the rule that the American Law Institute's authoritative Restatement of Contracts states:

> "A, a proprietor of a patent, licenses C, D and E to manufacture the patented article and to sell it for not less than a stated price. The condition of the license fixing the price is not illegal."[2]

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[1] *Goshen Rubber Works* v. *Single Tube Automobile & Bicycle Tire Co.*, 166 Fed. 431 (C. C. A. 7th, 1908); *Rubber Tire Wheel Co.* v. *Milwaukee Rubber Works Co.*, 154 Fed. 358 (C. C. A. 7th, 1907); *Indiana Mfg. Co.* v. *J. I. Case Threshing Mach. Co.*, 154 Fed. 365 (C. C. A. 7th, 1907); *United States* v. *United States Gypsum Co., et al.*, 67 F. Supp. 397 (D. C. 1946); *United States* v. *Wayne Pump Co., et al.*, 44 F. Supp. 949 (N. D. Ill. 1942); *General Electric Co., et al.* v. *Willey's Carbide Tool Co., et al.*, 33 F. Supp. 969 (E. D. Mich. 1940); *Massie, et al.* v. *Asbestos Brake Co., et al.*, 123 Atl. 155 (N. J. Ch. 1922).

[2] RESTATEMENT, CONTRACTS (1932) § 515, Illustration 12. See also WOOD, PATENTS AND ANTITRUST LAW (1942) pp. 182-183.

III

CONCLUSION

For the reasons stated, it is submitted that the judgment of the District Court should be affirmed.

Respectfully submitted,

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April 22, 1947.

APPENDIX

Exhibits Cited Showing Record Page Where Offered in Evidence

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